TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1963

No. [redacted] 10

MABEL GILLESPIE, ADMINISTRATRIX, ETC.,
PETITIONER,

vs.

UNITED STATES STEEL CORPORATION.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT
OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR CERTIORARI FILED OCTOBER 24, 1963
CERTIORARI GRANTED JANUARY 6, 1964

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1963

No. 582

MABEL GILLESPIE, ADMINISTRATRIX, ETC.,
PETITIONER,

vs.

UNITED STATES STEEL CORPORATION.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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[fol. 1] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF OHIO

No. C 62-655

MABEL GILLESPIE, ADMINISTRATRIX OF THE ESTATE OF DANIEL E. GILLESPIE, DECEASED, 101 Upright Street, Charlevoix, Michigan, Plaintiff,

—vs.—

UNITED STATES STEEL CORPORATION, c/o William J. Workman, Statutory Agent, c/o C. T. Corporation System, Union Commerce Building, Cleveland, Ohio, Defendant.

AMENDED COMPLAINT—(DEMAND FOR JURY TRIAL)—
Filed December 18, 1962

First Cause of Action

I

Plaintiff, an individual residing in Charlevoix, Michigan, and a citizen of the State of Michigan, brings this action in her representative capacity as the qualified and acting administratrix of the Estate of Daniel Edward Gillespie, deceased, who died on the 25th day of August, 1961, at a time when he was 38 years of age. She is the surviving mother of the deceased and, along with Louis Eugene Gillespie, a brother of the deceased, and Rosanna G. Harvey, Mary Jane Gillespie and Roberta G. Keiser, all sisters of the deceased, constitute the sole and only legal heirs and beneficiaries of the deceased. As administratrix, she brings this action for the benefit of said legal heirs and next of kin, [fol. 2] all or part of whom were dependent upon decedent for financial support, pursuant to Section 33 of the Merchant Marine Act of 1920, 41 Stat. 1007; 46 U.S.C.A. Section 688, the General Maritime Law, the Ohio Wrongful Death Act, Ohio Revised Code, Sec. 2125.01 et seq., and the

Ohio Survival Statute, Ohio Revised Code, Sec. 2305.21 et seq.

II

During all times herein mentioned, the defendant United States Steel Corporation was the owner of the Steamship "Governor Miller", and used it in the transportation of freight in interstate and foreign commerce. During all times herein mentioned, the defendant, through its Pittsburgh Steamship Division, maintained and operated the Steamship "Governor Miller"; at all times herein mentioned, this defendant, through its National Tube Division, conducted business in and near Lorain, Ohio, and owned, operated and maintained a docking facility on the Black River known as National Tube Dock, Lorain, Ohio; said defendant is incorporated in the State of New Jersey, has its principal place of business in the State of Ohio, and is a resident of the State of Ohio by virtue of its business activities in the City of Cleveland, Ohio.

III

On or about August 25, 1961, at or near 3:30 P.M., plaintiff's decedent was employed by defendant by and through its Pittsburgh Steamship Division as a seaman on the Steamship "Governor Miller", under articles, for wages and found, while the Steamship was moored to the National Tube Dock in Lorain, Ohio, upon the waters of the Great Lakes.

[fol. 3]

IV

Plaintiff's decedent had just returned to the ship from liberty and was standing on the concrete dock to which the ship was moored. There was a deposit of wet ore on the concrete dock; it was dark and raining heavily and a high wind blew in gusts. Plaintiff's decedent assisted another seaman in the employ of this defendant in shifting a mooring cable to assist in the unloading process and then waited to board the vessel after it completed the operation of shifting berth. Before it had completed its shifting operation, a ladder was lowered from the vessel toward the dock for boarding purposes. As plaintiff's decedent reached

for the ladder to board the vessel, his feet slipped on the wet ore and wet surface of the dock, he lost his balance, fell into the Black River at the National Tube Dock and drowned. As a proximate result of the negligence of the defendant as described in detail below, decedent lost his life by drowning.

At the time and place herein described, defendant performed or failed to perform the following acts:

(a) It constructed and maintained a docking facility which was slippery when wet.

(b) It constructed and maintained a docking facility which was of such a curved conformation as to prevent vessels from approaching sufficiently close to the dock to use gangplanks of ordinary length for access to the ship from the dock.

(c) It failed to provide adequate barricades along its docking facilities to prevent persons, and this dece- [fol. 4] dent in particular, from falling over the edge into the water.

(d) It permitted loose ore to accumulate along the edge of the docking facilities, when it knew or should reasonably have known that such ore is a dangerous and slippery substance, particularly when wet.

(e) It failed to remove accumulated dirt on the portions of the docking facility so that plaintiff's decedent was required to make his way along the slippery edge of the dock.

(f) It failed to provide plaintiff's decedent with a safe place to work and with safe appliances and equipment with which to work.

(g) It failed to properly illuminate the docking facilities.

(h) It failed to provide plaintiff's decedent with a safe means of access to its ship.

(i) It shifted its vessel in such a manner as to prevent the use of a gangplank as a means of access to its ship from the dock.

(j) It lowered a ladder from its vessel at a time when the ship was not sufficiently secured to the dock to permit safe boarding.

(k) It failed to provide a ladder for boarding the vessel which had guard rails of sufficient length to provide safe access to the ship.

[fol. 5] (l) It provided a ladder as a means of access to its vessel from the dock which was defective, unstable, slippery, dangerous and unsafe.

(m) It failed to provide and maintain a watchman or licensed officer to superintend and supervise the shifting operation of the vessel and the attempt of the plaintiff's decedent to board the ship under adverse weather conditions.

(n) It failed to employ a gangplank as a means of access to its vessel from the dock.

(o) It failed to warn plaintiff's decedent of the dangerous and slippery condition of the docking facilities, even though it knew or should reasonably have known that deposits of wet ore were accumulated upon the dock near the edge of the waterway.

(p) Through its agent and employees it ordered plaintiff's decedent to board the vessel in the manner and from the position which he attempted to employ, despite the fact that its agents and employees in command of the vessel and the unloading operation at the National Tube Dock knew or should reasonably have known that the dock surface was wet and slippery, it was dark and rain was falling, and wet, slippery ore had accumulated along the edge of the dock surface.

(q) It failed to provide gear or equipment for the use of plaintiff's decedent to protect him from falling [fol. 6] on the slippery and dangerous dock.

(r) It failed to equip its vessel in such a way as to eliminate the necessity of boarding ship in the manner employed by the plaintiff's decedent, from an unlit, unclean, defective and unsafe dock.

V

The failure of the defendant to provide gear and equipment to permit safe access to its vessel from a slippery, dangerous and unsafe dock and the defendant's failure to equip the ship with devices to eliminate the necessity of boarding the vessel by the ladder and tackle arrangement used, rendered the vessel unseaworthy; such unseaworthiness proximately caused the fall of the plaintiff's decedent from the dock and his resultant death by drowning.

VI

By reason of the above described occurrence, plaintiff's decedent suffered severe personal injuries which caused him excruciating pain and mental anguish prior to his death; plaintiff says that the fair and reasonable value of the conscious pain and suffering of the decedent prior to his death is in the sum of Fifteen Thousand Dollars ($15,000.00).

VII

As a direct and proximate consequence of the negligence of the defendant and its breach of its warranty of seaworthiness, plaintiff's decedent, 38 years old, in good health, earning and capable of earning substantial wages as a seaman, met his death by drowning. His wrongful death has caused substantial pecuniary damage and loss to the [fol. 7] legal heirs and beneficiaries of the decedent upon whose behalf this action is brought, in the sum of One Hundred Fifty Thousand Dollars ($150,000.00).

VIII

Plaintiff further alleges that as administratrix of the Estate of Daniel Edward Gillespie, she has incurred funeral and burial expenses for the decedent in the sum of One Thousand One Hundred Eleven Dollars ($1,111.00).

Wherefore, plaintiff prays for judgment against defendant in the aggregate sum of One Hundred Sixty-Six Thousand One Hundred Eleven Dollars ($166,111.00) and her costs.

Jack G. Day, Bernard A. Berkman, Attorneys for Plaintiff, 1748 Standard Building, Cleveland 13, Ohio, SU 1-8708.

Jury Demand

Plaintiff, through her attorneys Jack G. Day and Bernard A. Berkman, pursuant to Rule 38B, Federal Rules of Civil Procedure, herewith demands a trial by jury upon the issues in the subject cause.

Jack G. Day, Bernard A. Berkman, Attorneys for Plaintiff.

[fol. 8] Proof of Service (omitted in printing).

[fol. 9]

In United States District Court

Northern District of Ohio
Eastern Division

Civil Action No. C 62-655

[Title omitted]

Motion to Strike—Filed December 28, 1962

Now comes the defendant, United States Steel Corporation, and making of each request a separate motion and asking for a separate ruling on each request, moves the Court that an order be entered requiring the plaintiff to strike the following portions of the amended complaint for the respective reasons herein stated:

Request No. 1

That portion of the paragraph marked "I" of the alleged first cause of action, which reads as follows:

"* * * the General Maritime Law, the Ohio Wrongful Death Act, Ohio Revised Code, Sec. 2125.01 et seq., and the Ohio Survival Statute, Ohio Revised Code, Sec. 2305.21 et seq."

for the reason that said allegation refers to legal remedies which can have no application to this case and, therefore, said allegation is irrelevant, immaterial, incompetent and prejudicial to the defendant.

Request No. 2

The entire paragraph marked "V" of the alleged first cause of action, which paragraph reads as follows:

> [fol. 10] "The failure of the defendant to provide gear and equipment to permit safe access to its vessel from a slippery, dangerous and unsafe dock and the defendant's failure to equip the ship with devices to eliminate the necessity of boarding the vessel by the ladder and tackle arrangement used, rendered the vessel unseaworthy; such unseaworthiness proximately caused the fall of the plaintiff's decedent from the dock and his resultant death by drowning."

for the reason that such allegations as are contained in said paragraph marked "V" are predicated upon the doctrine of unseaworthiness, which has no legal application to this case and, therefore, said allegations are irrelevant, immaterial, incompetent and prejudicial to the defendant.

Request No. 3

That portion of the paragraph marked "VII" which reads as follows:

"* * * and its breach of its warranty of seaworthiness"

and that portion which reads:

"his wrongful death"

for the reason that said allegations are based on legal remedies which can have no application to this case and, therefore, said allegations are irrelevant, immaterial, incompetent and prejudicial to the defendant.

Request No. 4

That portion of the paragraph marked "I" of the alleged first cause of action which reads as follows:

"* * * and, along with Louis Eugene Gillespie, a brother of the deceased, and Rosanna G. Harvey, Mary Jane Gillespie, and Roberta G. Keiser, all sisters of the deceased, constitute the sole and only legal heirs and beneficiaries of the deceased. As administratrix, she brings this action for the benefit of said legal heirs and next of kin, all or part of whom were dependent upon decedent for financial support, * * *"

for the reason that the plaintiff is not entitled under the law to bring this action on behalf of the decedent's legal heirs and next of kin when it appears that the decedent left a parent surviving.

[fol. 11] Request No. 5

That portion of the paragraph marked "VII" of the alleged first cause of action, which reads as follows:

"* * * has caused substantial pecuniary damage and loss to the legal heirs and beneficiaries of the decedent upon whose behalf this action is brought, * * *"

for the reason that plaintiff is not entitled to bring this action on behalf of decedent's legal heirs and beneficiaries when it appears that the decedent left a parent surviving.

A brief in support of this motion is attached hereto and made a part hereof.

Respectfully submitted,

Arter, Hadden, Wykoff & Van Duzer, By: Robert B. Preston, 1144 Union Commerce Building, Cleveland 14, Ohio 621-5050, Attorneys for Defendant, United States Steel Corporation.

Brief in Support of Motion

The original complaint in this action was filed on August 20, 1962, and on November 15, 1962, a motion to strike was filed on behalf of the defendant. On or about December 18, 1962, the plaintiff filed an amended complaint, but did not file any brief in opposition to the original motion to strike. The amended complaint is virtually a copy of the original complaint with one change, that change being in the paragraph marked "I" and at the end thereof, where it is alleged that the action is brought pursuant to certain state and federal laws. The original complaint stated that [fol. 12] the action was brought pursuant to (1) the Jones Act (46 U.S.C.A. Section 688); (2) the General Maritime Law (unseaworthiness); and (3) the Ohio Wrongful Death Act (Ohio Revised Code, Section 2125.01 et seq.). The amended complaint, which is now before this Court, recites that the legal remedies relied upon are the above-mentioned three laws and, in addition, the Ohio Survival Statute (Ohio Revised Code, Section 2305.21 et seq.). Other than this change, the amended complaint is virtually word for word a repetition of the original complaint. Apparently, counsel for plaintiff feels that the Survival Statute cures and satisfies the defendant's motion to strike. However, the defendant submits that this is not the case. There is a basic difference here and that is whether the legal remedies available to the plaintiff are based on federal or state law. This is an action brought by the personal representative of a deceased seaman to recover for the death of said seaman from the seaman's employer and such an action must rest on the Jones Act, 46 U.S.C.A., Section 688. Defendant submits that the existence or non-existence of a state survival statute has no bearing whatever on this question.

For the Court's convenience, we will reproduce in full our original brief filed in support of our original motion to strike. We submit that in this area there is no question that the law is clear that the decisions under the Jones Act and federal law control this action to the exclusion of state remedies, and we further submit that this motion should be granted in all respects.

Brief in Support of Motion

(From Original Motion to Strike)

Basically, the motion to strike is based upon two propositions of law, notwithstanding the fact that several inde- [fol. 13] pendent requests have been made for the purpose of clarity. Requests Nos. 1, 2, and 3 of the motion to strike are based upon one proposition of law and Requests Nos. 4 and 5 are based on the other.

With respect to Requests Nos. 1, 2, and 3, it will be noted that these requests ask the court to strike portions of the complaint which allege the General Maritime Law doctrine of unseaworthiness and the Ohio Wrongful Death Act as a basis for plaintiff's cause of action. It is submitted by the defendant that an action to recover damages for the death of a seaman cannot be supported in law by the application of either a state wrongful death statute or the General Maritime Law doctrine of unseaworthiness.

First of all, it should be noted that the complaint alleges that the decedent was a seaman employed by the Steamship Governor Miller and that decedent, as a seaman, was under articles for wages and found (paragraph III of the complaint). It is also alleged (paragraph I of the complaint) that the action is brought pursuant to Section 33 of the Merchant Marine Act of 1920, 46 U.S.C.A. Section 688, which is commonly known as the Jones Act. For many years it has been the law that in the event of the death of a seaman, which death is allegedly caused by negligence, the Jones Act provides a right of action. However, there is no right of action for the death of a seaman caused by unseaworthiness of a vessel under the General Maritime Law, nor is there a right of action for the death of a seaman under state wrongful death acts. This proposition was decided by the United States Supreme Court in the case of *Lindgren* v. *United States*, 281 U.S. 38. It is stated in paragraph 4 of the *Lindgren* case:

> "The right of action given by the second clause of Section 33 of the Merchant Marine Act to the personal representative to recover damages for and on behalf of designated beneficiaries, for the death of a seaman

when caused by negligence, is exclusive, and precludes a right of recovery of indemnity for the death by [fol. 14] reason of the unseaworthiness of the vessel, irrespective of negligence, notwithstanding that the right be predicated upon the death statute of the state in which the injury was received."

This proposition has been well established in the admiralty law. As stated in Norris, *The Law of Seamen* (2nd Edition, 1962), on p. 771:

"Under the General Maritime Law there is no liability for wrongful death."

and, further, at p. 813:

"The Merchant Marine Act of 1920 is one of general application intended to bring about uniformity in the exercise of admiralty jurisdiction which is required by the Constitution. Congress, in the exercise of its paramount authority to legislate, enacted the Jones Act, which as a death statute supersedes the application of the death statutes of the several states."

The *Lindgren* case has been followed by a number of cases, some of the more recent cases being *Turner* v. *Wilson Line of Massachusetts*, 142 F. Supp. 264 (D.C.D. Mass., 1956); *Holland* v. *Steag, Inc.*, 143 F. Supp. 203 (D.C.D. Mass., 1956); *Mortenson, et al.* v. *Pacific Far East Line*, 1956 A.M.C. 2275 (D.C.N.D. Cal., 1956); *Robbins* v. *Esso Shipping Co.*, 190 F. Supp. 880 (D.C.S.D.N.Y., 1960). Headnotes 1 and 2 from the *Robbins* case are as follows:

"1. No remedy for wrongful death was provided under general maritime law, and suitor was required to look to wrongful death statute."

"2. The Jones Act grants a right of action in case of death of any seaman and supersedes application of death statutes of several states."

This Court has heretofore recognized and applied these legal principles in previous cases pending before this Court.

A motion to strike similar allegations of a complaint was filed in the case of *Bracie Ratcliffe, Administratrix* v. *Pittsburgh Steamship Division, United States Steel Corporation*, Civil Action No. 33846.

[fol. 15] It is submitted that the allegations of the complaint which are set forth in quotations in Requests Nos. 1, 2, and 3 of the foregoing motion to strike are allegations of legal principles and conclusions which can have no application to this case; that the same are immaterial, irrelevant, and prejudicial to the defendant and should be stricken from the complaint.

With respect to Requests Nos. 4 and 5, here again, it should be pointed out that the within action, being an action under the Jones Act for recovery for the death of a seaman, must conform to the law relating thereto. The Jones Act, Title 46 U.S.C.A. Section 688, provides in part as follows:

> "Any seaman who shall suffer personal injury in the course of his employment * * * and in case of the death of any seaman as the result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States covering or regulating the right of action for death in the case of railway employees shall be applicable. * * *"

As can be seen from the above, the Jones Act incorporates by reference the Federal Employers' Liability Act. The pertinent section of the Federal Employers' Liability Act which deals with the death of railway employees is found in Title 45 U.S.C.A. Section 51 which provides in part:

> "Every common carrier by railroad * * * shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in the case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then to such employee's parents; and, if

> none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, * * *"

The cause of action which is created for death by Title 45 U.S.C.A. Section 51 is not created in favor of the decedent's estate or his heirs at law but in favor of certain classes of beneficiaries. There are three such classes: [fol. 16] *First*, the surviving widow or husband and children of such employee; *Second*, the employee's parents; and *Third*, the next of kin dependent upon such employee.

It is well settled that the liability imposed by the Act is to one of the three classes of beneficiaries and not to the several classes collectively. Thus, if a decedent is survived by a person who falls within the first class of beneficiaries, the action must be brought on behalf of that person to the exclusion of survivors in either of the other two classes of beneficiaries. If there are no survivors in the first class of beneficiaries, then the action must be brought on behalf of those who fall within the second class of beneficiaries; and if there are no persons falling within the first or second class of beneficiaries, then and only then may the action be brought on behalf of the third class of beneficiaries who are the next of kin of the decedent, who were dependent upon such decedent.

The leading case on this proposition is *Chicago, Burlington & Quincy RR Co.* v. *Wells, Dickey Trust Co., Adm'r.*, 275 U.S. 161. In that case the court said at p. 163:

> "* * * The cause of action as there expressed, accrues to the widow and children, if either survives. It accrues to the parents if neither widow nor child survives. It accrues to the next of kin dependent upon the employee, only if there is no surviving widow, child or parent. There are, thus, three classes of possible beneficiaries, but the liability is in the alternative. It is to one of the three; not to the several classes collectively. * * *"

See also *Poff* v. *Pennsylvania R. Co.*, 327 U.S. 399.

In the instant case plaintiff has alleged that she brings this cause of action on behalf of herself and that she is the mother of the decedent and also alleges that the action is brought on behalf of a brother and three sisters of the decedent. Thus, the plaintiff has affirmatively alleged in [fol. 17] her petition that she, as the mother of the decedent, has survived and, therefore, she falls within the second category of beneficiaries, but the brother and sisters would fall within the third class of beneficiaries, and so long as she survives the action may only be brought for her benefit to the exclusion of the brother and sisters. For this reason, defendant submits that Requests Nos. 4 and 5 of its motion to strike should be granted.

To summarize, defendant contends that the allegations of the complaint, which are set forth in five separate Requests in this motion to strike, are allegations which in law have no application to this case, which is a case brought to recover damages for the death of a seaman, and if such allegations are allowed to remain in the complaint, they constitute irrelevant and immaterial matters which, in addition, are prejudicial to the defendant. Therefore, defendant respectfully submits that its motion to strike should be granted in all respects.

Respectfully submitted,

Arter, Hadden, Wykoff & Van Duzer, By: Robert B. Preston, Attorneys for Defendant.

Proof of Service (omitted in printing).

[fol. 18] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF OHIO

EASTERN DIVISION

Civil No. C 62-655

[Title omitted]

MEMORANDUM ON MOTION TO STRIKE—January 29, 1963

JONES, J.:

Upon careful consideration of the motion and briefs filed pro and con in this matter it is my opinion that the motion to strike should be granted in its entirety.

While a litigant may have more than one ground or theory of recovery there can be but one satisfaction and not more than one remedy.

It adds nothing to the right of recovery or the measure of damage that several laws may have supported a seaman's suit.

A reading of the complaint as to the facts and character of the suit spells "Jones Act". The incorporation of the additional legal provisions in the complaint gives no greater right or remedy than that furnished by the Jones Act.

The Jones Act gives complete coverage so far as any remedy is provided in any other legislation and indeed even more. There can be but a single recovery,—one satisfaction. The action must be brought by a legal representative; members of the family of the deceased seaman can not bring single or collective suits for individual or joint re-[fol. 19] covery.

In my opinion, the criticism of the Supreme Court's decision in Lindgren vs. United States, 281 U.S., page 38, seems a bit captious, and does not add to the orderly and complete legal recovery for wrongful death and other faults resulting in injury and damage to seamen.

An order may be entered carrying this decision into effect.

P. Jones, United States District Judge.

January 29, 1963.

[fol. 20] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF OHIO

EASTERN DIVISION

No. C 62-655

[Title omitted]

ORDER GRANTING DEFENDANT'S MOTION TO STRIKE—
January 30, 1963

JONES, J.:

Upon consideration,

It Is Ordered that Defendant's motion to strike is granted.

P. Jones, United States District Judge.

[fol. 21] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF OHIO

EASTERN DIVISION

No. C 62-655

[Title omitted]

NOTICE OF APPEAL—Filed March 1, 1963

Notice is hereby given that plaintiff appeals to the United States Court of Appeals for the Sixth (6th) Circuit from the order granting the defendant's motion to strike allegations from the amended complaint, entered in this action on January 30, 1963.

Jack G. Day, Bernard A. Berkman.

[fol. 22] [File endorsement omitted]

IN UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

No. 15,383

MABEL GILLESPIE, Administratrix of the Estate of Daniel E. Gillespie, Deceased, Appellant,

—vs.—

UNITED STATES STEEL CORPORATION, a corporation, Appellee.

MOTION TO DISMISS APPEAL—Filed May 2, 1963

Now comes the appellee, United States Steel Corporation, by its attorneys, Arter, Hadden, Wykoff & Van Duzer, and moves this Court for an Order dismissing the appeal filed herein on the grounds that the Order of the District Court which is the subject of this appeal is not a final appealable order and, therefore, this appeal is premature. A brief in support of this Motion is attached hereto and made a part hereof.

Respectfully submitted,

Arter, Hadden, Wykoff & Van Duzer, By: Robert B. Preston, Attorneys for Appellee.

* * * * * * *

[fol. 23] [File endorsement omitted]

IN UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

No. 15389

Ex parte: In the Matter of MABEL GILLESPIE, Administratrix of the Estate of Daniel E. Gillespie, deceased,

MABEL GILLESPIE, guardian of Mary Jane Gillespie, an incompetent,

LOUIS EUGENE GILLESPIE, ROBERTA G. KEISER, ROSANNA G. HARVEY,

Petitioners.

MOTION FOR LEAVE TO FILE PETITION FOR EXTRAORDINARY RELIEF—Filed May 6, 1963

Petitioners Mabel Gillespie, individually, as administratrix of the Estate of Daniel E. Gillespie, deceased, and as guardian for Mary Jane Gillespie, an incompetent, Louis Eugene Gillespie, Roberta G. Keiser and Rosanna G. Harvey, all beneficiaries named in the amended complaint in an action pending in the United States District Court for the Northern District of Ohio entitled, "Mabel Gillespie, Administratrix of the Estate of Daniel E. Gillespie, deceased v. United States Steel Corporation", No. C 62-655, respectfully move this court:

1. For leave to file the petition submitted herewith for a writ of mandamus, injunction or other appropriate relief.

[fol. 24] 2. That a rule be entered and issued directing the Honorable Paul Jones, Judge of the United States District Court for the Northern District of Ohio to show cause why a writ of mandamus or an injunction should not issue against him in accordance with the prayer of said petition and why petitioner should not

have such other and further relief as may be just and proper.

Dated: March , 1963.

Mabel Gillespie, Individually and as Administratrix, Mabel Gillespie, Guardian of Mary Jane Gillespie, an incompetent, Louis Eugene Gillespie, Roberta G. Keiser, Rosanna G. Harvey, Petitioners.

Jack G. Day, Bernard A. Berkman.

[fol. 25] [File endorsement omitted]

IN UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

No. 15389

Ex parte: In the Matter of MABEL GILLESPIE, Administratrix of the Estate of Daniel E. Gillespie, deceased,

MABEL GILLESPIE, guardian of Mary Jane Gillespie, an incompetent,

LOUIS EUGENE GILLESPIE, ROBERTA G. KEISER, ROSANNA G. HARVEY, Petitioners

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PETITION FOR WRIT OF MANDAMUS, INJUNCTION OR OTHER APPROPRIATE RELIEF—Filed May 6, 1963

To the Honorable Judges of the United States Court of Appeals for the Sixth Circuit:

1. Your petitioner, Mabel Gillespie, is an individual residing in Charlevoix, Michigan, and a citizen of the State of Michigan. She is the mother of Daniel Edward Gillespie, deceased, and the duly qualified and acting administratrix of his estate. She is the plaintiff in a civil action filed in the United States

District Court for the Northern District of Ohio, bearing case number C 62-655, entitled "*Mabel Gillespie*, Administratrix of the Estate of Daniel E. Gillespie, deceased v. *United States Steel Corporation*".

[fol. 26] 2. Your petitioner, Mabel Gillespie, is also guardian of Mary Jane Gillespie, an incompetent. Mary Jane Gillespie is the sister of the deceased, wholly dependent upon her decedent brother for support, and a beneficiary named in the amended complaint in the above described action.

3. Your petitioners, Louis Eugene Gillespie, Roberta G. Keiser and Rosanna G. Harvey are brother and sisters of the decedent and named beneficiaries in the amended complaint in the above described action.

4. In the above described action, currently pending in the United States District Court for the Northern District of Ohio, your petitioner Mabel Gillespie, as the personal representative of the decedent, sought damages for the conscious pain and suffering and wrongful death of the decedent from the defendant, United States Steel Corporation. The wrongful death action was brought for the benefit of your petitioners and arose out of the decedent's death while in the employ of the defendant. Recovery was sought pursuant to the Jones Act, Section 33 of the Merchant Marine Act of 1920, 41 Stat. 1007, 46 U.S.C.A. Section 688, as well as under the General Maritime Law, supplemented by the Ohio Wrongful Death Act, Ohio Revised Code, Section 2125.01 et seq. and the Ohio [fol. 27] Survival Statute, Ohio Revised Code, Section 2305.21 et seq. A copy of the amended complaint is attached hereto, designated "Exhibit A" and incorporated herein by reference.

5. Defendant responded to the amended complaint by filing a motion to strike all allegations from the complaint which referred to the General Maritime Law, the doctrine of unseaworthiness and the Ohio Statutes noted in paragraph (4) above, as well as all reference to all the named beneficiaries but Mabel

Gillespie individually. A copy of the defendant's motion, incorporating its grounds, is attached hereto, designated "Exhibit B" and incorporated herein by reference.

6. Petitioner Mabel Gillespie resisted the motion to strike on the grounds that the general maritime doctrine of unseaworthiness coupled with the state wrongful death act is an alternate theory of liability to the Jones Act for a single recovery for wrongful death of a seaman against his employer and that the other named beneficiaries, the other petitioners here, were entitled to recovery as beneficiaries under the state wrongful death statute, which would apply if a finding of unseaworthiness was made at the trial of this cause. A copy of her brief in opposition to the motion to strike, setting out her arguments and [fol. 28] authorities is attached, designated "Exhibit C" and incorporated herein by reference.

7. On January 30, 1963, the Honorable Paul Jones of the United States District Court for the Northern District of Ohio granted the defendant's motion to strike in its entirety, thereby eliminating from the case of your petitioner, Mabel Gillespie, individually, the alternate theory of recovery for unseaworthiness and denying entirely the right of these petitioners apart from Mabel Gillespie, individually, to recover for the wrongful death of their brother, the decedent, at the trial of this cause. A copy of the order of the court is attached hereto, designated "Exhibit D" and incorporated herein by reference.

8. The opinion of the Honorable Paul Jones of the United States District Court for the Northern District of Ohio in support of his order which is described in detail and effect in paragraph (7) above and designated "Exhibit D", and from which petitioners seek relief, demonstrated such certitude and conviction in disposing of the substantive issues raised as to preclude the success of any attempt upon the part of your petitioners to obtain an appealable

order by virtue of 28 U.S.C.A. §1292(b), which requires a written statement from the district judge that he is "of the opinion that [his] order involves [fol. 29] a controlling question of law *as to which there is substantial ground for difference of opinion.*" (emphasis supplied) A copy of the opinion, dated January 29, 1963, is attached hereto, designated "Exhibit E" and incorporated herein by reference.

9. Upon the conviction that the rights of your petitioners other than Mabel Gillespie have been finally adjudicated adversely to their interests and that the order striking their claims from the amended complaint as described above in paragraph (7) is a final appealable order as to them, on March 1, 1963 your petitioner Mabel Gillespie perfected her appeal to this court by filing notice of appeal in the United States District Court in accordance with the provisions of Rule 73 of the Federal Rules of Civil Procedure.

10. Your petitioners represent to this court that to require them to proceed to trial only upon the claim of your petitioner Mabel Gillespie under the Jones Act alone in advance of their appeal of the order from which they seek relief, thereby eliminating the doctrine of unseaworthiness as an alternative theory of recovery for your petitioner Mabel Gillespie and foreclosing entirely the named beneficiaries apart from Mabel Gillespie, individually, from having their claims litigated in the same jury proceeding, is unduly oppressive, unjust, expensive and will delay un- [fol. 30] necessarily the ultimate determination of this cause.

11. Should the appeal referred to in paragraph (9) above be denied as a non-appealable order, then and in such event, your petitioners urge that they have exhausted, without success, every remedy available to them. To resolve the substantive issues in this case in advance of trial so that a speedy, just and orderly disposition of this cause may be made, your petitioners now ask

this court for appropriate extraordinary relief so that their case may proceed to jury trial in a manner which will permit a full and complete determination of the rights of all of your petitioners at one time.

Wherefore, petitioners pray that a writ of mandamus, injunction or other appropriate writ issue out of this court, directed to the Honorable Paul Jones, Judge of the District Court of the United States for the Northern District of Ohio, commanding him, as such judicial officer,

1. to vacate the order entered by him on January 30, 1963, more fully described in paragraph (7) above,

and, in addition,

2. to make an order either

(a) denying the motion to strike in all its branches,

or, in the alternative,

[fol. 31] (b) granting the said motion, incorporating therein the requisite written statement to effectively render his said order appealable within the provisions of 28 U.S.C.A. §1292(b)

so that the substantive issues affected by the order may be litigated through the appropriate appellate channels in advance of trial in the federal district court, and to do and perform such other acts and things as may be necessary and proper in the premises.

Dated March , 1963.

Mabel Gillespie, Individually and as Administratrix, Mabel Gillespie, Guardian of Mary Jane Gillespie, an incompetent, Louis Eugene Gillespie, Roberta G. Keiser, Rosanna G. Harvey, Petitioners.

[fol. 32] *Duly sworn to by Mabel Gillespie, Louis Eugene Gillespie and Robert G. Keiser, et al., jurats omitted in printing.*

[fol. 35] Clerk's Note:

Exhibits A, B, D and E to "Petition for Writ of Mandamus" are omitted from the record here as they appear at printed pages 1, 6, 16, 15, side folios 1, 9, 20 and 18 *supra*, respectively.

[fol. 36] [File endorsement omitted]

IN UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

No. 15,383

MABEL GILLESPIE, Administratrix of the Estate of Daniel E. Gillespie, Deceased, Appellant,

v.

UNITED STATES STEEL CORPORATION, a corporation, Appellee.

No. 15,389

MABEL GILLESPIE, Administratrix of the Estate of Daniel E. Gillespie, Deceased, and Guardian of Mary Jane Gillespie, an incompetent, and LOUIS EUGENE GILLESPIE, ROBERTA G. KEISER, and ROSANNA G. HARVEY, Petitioners,

v.

HONORABLE PAUL JONES, Judge of the United States District Court for the Northern District of Ohio, Respondent.

ORDER OF CONSOLIDATION—Filed July 29, 1963

Before: Weick and O'Sullivan, Circuit Judges, and McAllister, Senior Circuit Judge.

The motion for consolidation of the petition for writ of mandamus, injunction, or other appropriate relief, and of the appeal from the order of the District Court, is hereby granted, and the said petition and appeal are hereby con-
[fol. 37] solidated in this court.

Approved for Entry:

Thomas F. McAllister, Senior United States Circuit Judge.

[fol. 38] [File endorsement omitted]

In United States Court of Appeals

For the Sixth Circuit

No. 15,383

Mabel Gillespie, Administratrix of the Estate of Daniel E. Gillespie, Deceased, Appellant,

v.

United States Steel Corporation, a corporation, Appellee.

Order Denying Motion to Dismiss—Filed July 29, 1963

Before: Weick and O'Sullivan, Circuit Judges, and McAllister, Senior Circuit Judge.

It is Ordered that the motion to dismiss the appeal be and is hereby denied.

Approved for Entry:

Thomas F. McAllister, Senior United States Circuit Judge.

[fol. 39] [File endorsement omitted]

IN UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

No. 15,383

MABEL GILLESPIE, Administratrix of the Estate of Daniel E. Gillespie, Deceased, Appellant,

v.

UNITED STATES STEEL CORPORATION, a corporation, Appellee.

ORDER AFFIRMING THE ORDER OF THE DISTRICT COURT—
Filed July 29, 1963

Before: Weick and O'Sullivan, Circuit Judges, and McAllister, Senior Circuit Judge.

It is hereby Ordered, Adjudged and Decreed that the Order of the District Court, striking from appellant's complaint the allegations relating to the general maritime law doctrine of unseaworthiness, and the allegations relating to the Ohio Wrongful Death Act, be affirmed.

Approved for Entry:

Thomas F. McAllister, Senior United States Circuit Judge.

[fol. 40] [File endorsement omitted]

IN UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

No. 15,389

MABEL GILLESPIE, Administratrix of the Estate of Daniel E. Gillespie, Deceased, and Guardian of Mary Jane Gillespie, an incompetent, and LOUIS EUGENE GILLESPIE, ROBERTA G. KEISER, and ROSANNA G. HARVEY, Petitioners,

v.

HONORABLE PAUL JONES, Judge of the United States District Court for the Northern District of Ohio, Respondent.

ORDER GRANTING MOTION TO FILE PETITION FOR A WRIT OF MANDAMUS, ETC.—Filed July 29, 1963

Before: Weick and O'Sullivan, Circuit Judges, and McAllister, Senior Circuit Judge.

The motion for leave to file the petition for a writ of mandamus, injunction, or other appropriate relief, is hereby granted.

Approved for Entry:

Thomas F. McAllister, Senior United States Circuit Judge.

[fol. 41] [File endorsement omitted]

IN UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

No. 15,389

MABEL GILLESPIE, Administratrix of the Estate of Daniel E. Gillespie, Deceased; MABEL GILLESPIE, Guardian of Mary Jane Gillespie, an incompetent, LOUIS EUGENE GILLESPIE, ROBERTA G. KEISER, and ROSANNA G. HARVEY, Petitioners,

vs.

HONORABLE PAUL JONES, Judge of the United States District Court for the Northern District of Ohio, Respondent.

ORDER DENYING PETITION FOR WRIT OF MANDAMUS, ETC.—
Filed July 29, 1963

Before: Weick and O'Sullivan, Circuit Judges, and McAllister, Senior Circuit Judge.

It is ordered that the petition for writ of mandamus, injunction, or other extraordinary relief be and it is denied.

Approved for Entry:

Thomas F. McAllister, Senior Circuit Judge.

[fol. 42]

Nos. 15383, 15389

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

No. 15,383

MABEL GILLESPIE, Administratrix of the Estate of Daniel E. Gillespie, Deceased,
Plaintiff-Appellant,

v.

UNITED STATES STEEL CORPORATION, a corporation,
Defendant-Appellee.

MOTION TO DISMISS APPEAL.

No. 15,389

MABEL GILLESPIE, Administratrix of the Estate of Daniel E. Gillespie, Deceased, and Guardian of Mary Jane Gillespie, an incompetent, and LOUIS EUGENE GILLESPIE, ROBERTA G. KEISER, AND ROSANNA G. HARVEY,
Petitioners,

v.

HONORABLE PAUL JONES, Judge of the United States District Court for the Northern District of Ohio,
Respondent.

PETITION FOR A WRIT OF MANDAMUS, INJUNCTION OR OTHER APPROPRIATE RELIEF.

Decided July 29, 1963.

Before WEICK and O'SULLIVAN, Circuit Judges and MCALLISTER, Senior Circuit Judge.

MCALLISTER, Senior Circuit Judge. Appellant, Mabel Gillespie, Administratrix of the Estate of Daniel E. Gilles-

pie, Deceased, filed her complaint against the United States Steel Corporation, as defendant, in the District Court, for the recovery of damages arising out of the death of her decedent, who was a seaman and a member of the crew of one of appellee's steamers, engaged in transportation, as a cargo carrier, on the Great Lakes. The complaint alleged a cause of action based upon three separate grounds: (1) Title 46 U.S.C.A., Section 688 (the Jones Act); (2) the general maritime law (unseaworthiness); and (3) the Ohio Wrongful Death Act.

Appellee filed a motion requesting the District Court to strike from the complaint the allegations relating to the general maritime law doctrine of unseaworthiness, and the allegations relating to the Ohio Wrongful Death Act, for the reason that the appellant's right to recover for the death of her decedent was based exclusively on the Jones Act. Briefs were filed in support of the motion and in opposition thereto. The District Court entered an order granting appellee's motion to strike. From this order, appellant prosecuted an appeal. Appellee filed a motion in this court for an order dismissing the appeal on the ground that the order of the District Court is not a final appealable order and, therefore, that the appeal was premature.

Before the motion to dismiss the appeal was heard by this court, appellant, Mabel Gillespie, filed a petition in this court for extraordinary relief, including a petition for a writ of mandamus, injunction, or other appropriate writ to be issued to the District Court commanding it to vacate the order striking from the complaint the allegations relating to the general maritime law doctrine of unseaworthiness, and the allegations relating to the Ohio Wrongful Death Act; and further commanding the District Court either to enter an order denying the motion to strike, or, in the alternative, granting the motion, and incorporating therein the requisite written statement to render appealable the said order within the provisions of Title 28 U.S.C.A., Section 1292(b). This petition for extraordinary relief was filed not only by Mabel Gillespie as administratrix, but as guardian of Mary Jane Gillespie, an incompetent; and she was joined in the petition by Louis Eugene Gillespie, Roberta G. Keiser, and Rosanna G. Harvey. Mabel Gillespie is the mother of decedent, and the other named petitioners are his brothers and sisters.

The party who initiated the suit, that is, plaintiff-appellant, and the parties who initiated the petition for extra-

ordinary remedy, that is, plaintiff-appellant and petitioners, seeking relief from a single order of the District Court, submit that they will be content if this court reaches the merits of the controversy, by either means, and strongly urge such a decision at this time. For this purpose, they moved to consolidate these appellate matters; and an order granting such motion for consolidation has been granted.[1]

The order of the District Court striking the allegations relating to unseaworthiness under the general maritime law and the Ohio Wrongful Death Act, if interlocutory, is not an appealable order. Title 28 U.S.C.A., Section 1292 confers jurisdiction upon this court to hear appeals in certain instances where interlocutory orders or decrees are involved; but the order of the District Court in this case, which, it is to be said, is not an order in a proceeding in admiralty, does not come within any of the statutory classifications in which this court has jurisdiction of an appeal in an interlocutory decision.[2]

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[1] In their brief, the so-called initiating parties state:

"The unnecessary expense in time and money, the duplication of effort, the frustration of being required to await the verdict in a trial in which one is not a participant and the piecemeal litigation compelled in the trial court, all as a result of appellate inaction now, are self-evident. Add to this the procedural morass involved in the refusal of the lower court to permit alternate claims under the general maritime law as a basis for liability in the wrongful death and conscious pain and suffering counts for those who yet remain in the suit. Consider also the practical possibility that once it has been determined that the questioned beneficiaries are either in or out of this lawsuit it will be easier for counsel on both sides to evaluate the cases for settlement purposes and the necessity for any trial at all may be eliminated. It is readily apparent that appellate intervention at this stage is vital to the parties and will involve less stress upon the judicial machinery than appellate inertia at this stage of the proceedings.

"If this court should consider the controversy on its merits and determine that the order of the court below was erroneous in any respect, that court may be ordered to conform its order to the appellate ruling, the problems listed above will be eliminated, and the matter may proceed to trial in orderly fashion.

"On the other hand, should this court determine that, on the merits, the order of the court below should be affirmed, a multiplicity of suits involving the same subject matter will have been avoided and the suit in the district court may proceed, this highly important issue having been completely resolved in advance of trial."

[2] Title 28 U.S.C.A., Section 1292 provides:

"Interlocutory decisions

(a) The courts of appeals shall have jurisdiction of appeals from:

(1) Interlocutory orders of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, or of the judges thereof, granting, continuing, modifying, refusing or dissolving injunctions, or re-

It is true that according to the statute, as appears in the margin, where a district judge enters an interlocutory order in a civil action, otherwise not appealable, and is of opinion that such order involves a controlling principle of law, as to which there is substantial ground for difference of opinion, and that an immediate appeal may materially advance the ultimate termination of the litigation, he shall so state in writing in such order, and the Court of Appeals may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after entry of the order. In the instant case, however, the District Court made no such order as above provided, and this Court did not permit such appeal.

It appears that, on its face, the order of the District Court, striking the allegations from the complaint, is not a final order, but an interlocutory order, and not appealable; and the cases cited by appellee sustain the foregoing proposition. *Lewis* v. *E. I. Du Pont de Nemours & Company, Inc.*, 183 F. 2d 29 (C.A. 5); *Cox* v. *Graves, Knight & Graves, Inc.*, 55 F. 2d 217 (C.C.A. 4). An order striking a portion of the pleadings is not a final order. *Markham* v. *Kasper, et al.*, 152 F. 2d 270 (C.A. 7); *Libbey-Owens-Ford Glass Co.* v. *Sylvania Indust. Corp.*, 154 F. 2d 814 (C.A. 2); *Stewart* v. *Shanahan*, 277 F. 2d 233 (C.A. 8).

However, counsel for appellant persuasively argues that the order of the District Court is not an interlocutory order, but a final order, because of these reasons: the order,

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fusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court;

(2) Interlocutory orders appointing receivers, or refusing orders to wind up receiverships or to take steps to accomplish the purposes thereof, such as directing sales or other disposals of property;

(3) Interlocutory decrees of such district courts or the judges thereof determining the rights and liabilities of the parties to admiralty cases in which appeals from final decrees are allowed;

(4) Judgments in civil actions for patent infringement which are final except for accounting.

(b) When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: *Provided, however*, That application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order."

striking the allegations in question, entirely eliminated decedent's dependent brothers and sisters as beneficiaries in the wrongful death action based upon unseaworthiness; it removed from the wrongful death count of decedent's mother, the alternate theory of unseaworthiness; and it further removed any right to recover damages for conscious pain and suffering of decedent on the alternate theory of liability for unseaworthiness.

The difficulties of determining what a "final" appealable order is, are ably discussed by counsel for appellant in his brief, which embraces the argument that, even in cases where interim orders are called final, they may be really interlocutory, but have been held appealable solely because of hardship; that where an interim order adversely affects substantial rights which cannot be adequately protected by a subsequent appeal, the hardship rule will be invoked to make such an order final and appealable; and that the provision for appeal only from final decisions should not be so constructed as to deny effective review of a claim fairly severable from the context of a larger litigious process. *Dickinson* v. *Petroleum Conversion Corp.*, 338 U.S. 507, 511; *Pabellon* v. *Grace Line*, 191 F. 2d 169, 179 (C.A. 2); *Holdsworth* v. *United States*, 179 F. 2d 933 (C.A. 1); *Forgay* v. *Conrad*, 6 How. 201; *Craighead* v. *Wilson*, 18 How. 199; *U.S. Alkali Export Assn.* v. *United States*, 325 U.S. 196; *Cohen* v. *Beneficial Ind. Loan Corp.*, 337 U.S. 541; *Swift & Co. Packers* v. *Compania Colombiana Del Caribe*, 339 U.S. 684.

The question whether the order of the District Court is an appealable or non-appealable order is a close one. We would, at this time, in the interest of the due and proper administration of justice, prefer to decide the appeal on the merits, if that be possible; and we think it is. Plaintiff-appellant and petitioners ask for a disposition on the merits at this time, and agree to submit the controversy for such a determination; and, while in the regular course, the record, printed indices, and briefs would be filed, and the case placed upon the calendar for argument, we shall proceed to a determination on the merits, since our decision will not prejudice the rights of appellee defendant and respondent, who have not entered a consent to such a disposition.

We are, accordingly, of the view that, in the light of the motion, petition, and arguments advanced in the briefs,

it is proper here to consider and pass upon the contention made by plaintiff-appellant and petitioners that the District Court erred in its order striking from the complaint the allegations basing the cause of action upon the general maritime law of unseaworthiness, and also striking the allegations basing the cause of action on the provisions of the Ohio Wrongful Death Act, leaving the plaintiff only the right to proceed under the Jones Act.

We proceed then to discuss the rights to which plaintiff-appellant and appellees are entitled under the Jones Act; whether they have any remedies under the general maritime law, and the Ohio Wrongful Death Act; whether the hardship rule applies as to interlocutory orders; and whether the motion to dismiss the appeal should be granted or denied.

We start first with the Jones Act. Prior to the Jones Act, 46 U.S.C.A., Section 688, there was no liability for wrongful death under the general maritime law. That law gave no right to recover indemnity for the death of a seaman, although occasioned by the unseaworthiness of the vessel, by negligence, and conferred no right whatever upon his personal representatives to recover damages. *Lindgren* v. *United States*, 281 U.S. 38.

The Jones Act gave a right of action to the personal representatives to recover damages, for and on behalf of designated beneficiaries, for the death of a seaman when caused by negligence. It provides:

> "Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located."

The effect of the Jones Act was to incorporate into the maritime law the statute applying to injuries to, and death of railway employees engaged in interstate commerce, known as the Federal Employers' Liability Act, Title 45 U.S.C.A., Section 51, which provides:

> "Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment."

Before proceeding to the other issues in the case, we shall dispose of the claim made for damages resulting from injuries to decedent causing conscious pain, suffering, and mental anguish prior to his death. The complaint alleges: "As plaintiff's decedent reached for the ladder to board the vessel, his feet slipped on the wet ore and wet surface of the dock, he lost his balance, fell into the Black River at the National Tube Dock and drowned"; that "[by] reason of the above described occurrence, plaintiff's decedent suffered personal injuries which caused him excruciating pain and mental anguish prior to his death. . . ." Assuming, at this point, that a right of action were to pass to decedent's relatives under the Ohio Wrongful Death Act, it would seem that there would be no substantial basis, in this case, for a separate estimate of pain and suffering.[3]

[3] In *The Corsair*, 145 U.S. 335, 348, the court said:

"We do not find it necessary to express an opinion whether a libel *in rem* will lie for injuries suffered by the deceased before her death,

[fol. 49]

Prior to the Jones Act, the general maritime law afforded no remedy by way of indemnity beyond maintenance and cure for the injury to a seaman caused by the mere negligence of a ship's officer or a member of the crew. Nevertheless, the admiralty rule that the vessel and owner were liable to indemnify a seaman for injury caused by the unseaworthiness of the vessel or its appurtenant appliances had been the settled rule long before the enactment of the Jones Act. *Mahnich* v. *Southern S.S. Co.*, 321 U.S. 96; *The Osceola*, 189 U.S. 158, 175. By the Jones Act, therefore, Congress created a new cause of action, not then known to maritime law, for bodily injuries to a seaman, or for his death, caused by the negligence of any of the officers, agents, or employees of the ship. Thus, an injured seaman may bring an action claiming damages under the Jones Act for negligence, and, under the general maritime law, for unseaworthiness. *McAllister* v. *Magnolia Petroleum Co.*, 357 U.S. 221. This, obviously, comes about because, prior to the Jones Act an injured seaman had a federal right in admiralty for an injury caused by unseaworthiness; and to this was added the new cause of action for negligence under the Jones Act.

Appellant, in the District Court, contended that she had the right to maintain an action for damages for the wrongful death of her decedent, a seaman, by reason of the unseaworthiness of the ship, under the general maritime law, as well as for negligence under the Jones Act. In reply, appellee submitted that the right of recovery for wrongful death given by the Jones Act is exclusive and precludes a

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a right of action for which passes to the immediate relatives, under the Louisiana statute, since there is no proper averment in the libel to show that such damages were suffered. It is true that the seventh paragraph alleges that from the time the 'tug struck the bank of the river to the time she sunk,' (about ten minutes,) 'and the said Ella Barton was drowned, she, said Ella Barton, suffered great mental and physical pains and shock, and endured the tortures and agonies of death.' But there is no averment from which we can gather that these pains and sufferings were not substantially contemporaneous with her death and inseparable as matter of law from it. *Kearney* v. *Boston & Worcester Railroad*, 9 Cush. 108; *Hollenbeck* v. *Berkshire Railroad Co.*, 9 Cush. 478; *Kennedy* v. *Standard Sugar Refinery*, 125 Mass. 90; *Moran* v. *Hollings*, 125 Mass. 93. Had she suffered bodily wounds and bruises, from the result of which she lingered and ultimately died, it is possible that her sufferings during her illness would give a separate cause of action; but the very fact that she died by drowning indicates that her sufferings must have been brief, and, in law, a mere incident to her death. Her fright for a few minutes is too unsubstantial a basis for a separate estimation of damages."

right of recovery of indemnity for the death of a seaman by reason of the unseaworthiness of the vessel.

In considering these contentions, we refer to the origin and development of the remedy for unseaworthiness. It is a doctrine judicially, rather than legislatively, created; and in *The State of Maryland*, 85 F. 2d 944, 945 (C.A. 4), Judge John J. Parker summarized the history of the remedy.[4]

In *Mitchell* v. *Trawler Racer, Inc.*, 362 U.S. 538, 544, Mr. Justice Stewart defined the doctrine of unseaworthiness, bringing it down to its latest development, in a notable opinion, in which, speaking for the court, he said: "The earliest mention of unseaworthiness in American judicial opinions appears in cases in which mariners were suing for their wages. They were required to prove the unseaworthiness of the vessel to excuse their desertion or misconduct which otherwise would result in a forfeiture of their right to wages. See *Dixon* v. *The Cyrus*, 7 Fed. Cas.

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[4] In the cited case, Judge Parker said:

"Seamen are the wards of admiralty, and the policy of the maritime law has ever been to see that they are accorded proper protection by the vessels on which they serve. In early days, this protection was sufficiently accorded by the enforcement of the right of 'maintenance and cure.' Vessels and their appliances were of comparatively simple construction, and seamen were in quite as good position ordinarily to judge of the seaworthiness of a vessel as were her owners . . .

"With the advent of steam navigation, however, it was realized, at least in this country, that 'maintenance and cure' did not afford to injured seamen adequate compensation in all cases for injuries sustained. Vessels were no longer the simple sailing ships, of whose seaworthiness the sailor was an adequate judge, but were full of complicated and dangerous machinery, the operation of which required the use of many and varied appliances and a high degree of technical knowledge. The seaworthiness of the vessel could be ascertained only upon an examination of this machinery and appliances by skilled experts. It was accordingly held that the duty of the vessel and her owners to the seaman, in this new age of navigation, extended beyond mere 'maintenance and cure,' which had been sufficient in the simple age of sailing ships; that the owners owed to the seamen the duty of furnishing a seaworthy vessel and safe and proper appliances in good order and condition; and that for failure to discharge such duty there was liability on the part of the vessel and her owners to a seaman suffering injury as a result thereof. *The Osceola*, 189 U.S. 158, 175. . . . In the *Edith Godden* (D.C.), 23 F. 43, 46, which dealt with the case of a seaman injured by a defective derrick, Judge Addison Brown pointed out that in dealing with injuries sustained by the use of modern appliances 'it is more reasonable and equitable to apply the analogies of the municipal law in regard to the obligation of owners and masters, rather than to extend the limited rule of responsibility under the ancient maritime law to these new, modern conditions, for which those limitations were never designed.' "

755, No. 3,930; *Rice* v. *The Polly & Kitty*, 20 Fed. Cas. 666, No. 11,754; *The Moslem*, 17 Fed. Cas. 894, No. 9,875. The other route through which the concept of unseaworthiness found its way into the maritime law was via the rules covering marine insurance and the carriage of goods by sea. *The Caledonia*, 157 U.S. 124; *The Silvia*, 171 U.S. 462; *The Southwark*, 191 U.S. 1; I Parsons on Marine Insurance (1868) 367-400.

"Not until the late nineteenth century did there develop in American admiralty courts the doctrine that seamen had a right to recover for personal injuries beyond maintenance and cure. During that period it became generally accepted that a shipowner was liable to a mariner injured in the service of a ship as a consequence of the owner's failure to exercise due diligence.

"This was the historical background behind Mr. Justice Brown's much quoted second proposition in *The Osceola*, 189 U.S. 158, 175: 'That the vessel and her owner are, both by English and American law, liable to an indemnity for injuries received by seamen in consequence of the unseaworthiness of the ship, or a failure to supply and keep in order the proper appliances appurtenant to the ship.' In support of this proposition the Court's opinion noted that '[i]t will be observed in these cases that a departure has been made from the Continental codes in allowing an indemnity beyond the expense of maintenance and cure in cases arising from unseaworthiness. This departure originated in England in the Merchants' Shipping Act of 1876 . . . and in this country, in a general consensus of opinion among the Circuit and District Courts, that an exception should be made from the general principle before obtaining, in favor of seamen suffering injury through the unseaworthiness of the vessel. We are not disposed to disturb so wholesome a doctrine by any contrary decision of our own.' 189 U.S., at 175. . . .

"In 1944 this Court decided *Mahnich* v. *Southern S.S. Co.*, 321 U.S. 96. While it is possible to take a narrow view of the precise holding in that case, the fact is that *Mahnich* stands as a landmark in the development of admiralty law. Chief Justice Stone's opinion in that case gave an unqualified stamp of solid authority to the view that *The Osceola* was correctly to be understood as holding that the duty to provide a seaworthy ship depends not at all upon the negligence of the shipowner or his agents. Moreover, the dissent in *Mahnich* accepted this reading of *The Osceola* and claimed no more than that the injury in

Mahnich was not properly attributable to unseaworthiness. See 321 U.S., at 105-113.

"In *Seas Shipping Co.* v. *Sieracki*, 328 U.S. 85, the Court effectively scotched any doubts that might have lingered after *Mahnich* as to the nature of the shipowner's duty to provide a seaworthy vessel. The character of the duty, said the Court, is 'absolute.' 'It is essentially a species of liability without fault, analogous to other well known instances in our law. Derived from and shaped to meet the hazards which performing the service imposes, the liability is neither limited by conceptions of negligence nor contractual in character. . . . It is a form of absolute duty owing to all within the range of its humanitarian policy.' 328 U.S., at 94-95. The dissenting opinion agreed as to the nature of the shipowner's duty. '[D]ue diligence of the owner,' it said, 'does not relieve him from this obligation.' 328 U.S., at 104.

"From that day to this, the decisions of this Court have undeviatingly reflected an understanding that the owner's duty to furnish a seaworthy ship is absolute and completely independent of his duty under the Jones Act to exercise reasonable care. . . .

"There is ample room for argument, in the light of history, as to how the law of unseaworthiness should have or could have developed. Such theories might be made to fill a volume of logic. But, in view of the decisions in this Court over the last 15 years, we can find no room for argument as to what the law is. What has evolved is a complete divorcement of unseaworthiness liability from concepts of negligence. To hold otherwise now would be to erase more than just a page of history."

However, all of the foregoing is concerned with damages growing out of a claim of unseaworthiness, resulting in *injuries* to a seaman, rather than indemnity for his *death* resulting from unseaworthiness, or, —in the case of *The Tungus*—for the death of a person who was not a seaman, and therefore, not under the Jones Act; and the foregoing adjudications are here referred to because of the contention in the District Court that the rule relating to the unseaworthiness of a vessel, resulting in injuries to a seaman, should also apply in case of his death resulting from such unseaworthiness.

While, prior to the Jones Act, a vessel and owner were liable to indemnify a seaman for injuries caused by unseaworthiness, nevertheless, before the passage of that Act,

the vessel and owner were not, under federal or maritime law, liable for the *death* of a seaman occasioned by unseaworthiness and negligence. *Lindgren* v. *United States*, 281 U.S. 38. Long before the *Lindgren case*, in *The Harrisburg*, 119 U.S. 199, it was held that, in the absence of an act of Congress or a statute of a State giving a right of action therefor, a suit in admiralty cannot be maintained in the courts of the United States to recover damages for the death of a human being on the high seas, or on waters navigable from the sea, which is caused by negligence.

This seems a somewhat harsh rule for the Admiralty to apply to its wards, of which it is customarily said it has such tender and protective feeling; and Mr. Justice Brennan in his opinion, partly dissenting and partly concurring, in *The Tungus* v. *Skovgaard*, 358 U.S. 588, 599, commented upon the holding of *The Harrisburg*, supra, saying that it was based largely on an application of the harsh common-law principle, and that, in the absence of an appropriate statute, there was no civil remedy for wrongful death. Nevertheless, he declared that "*the holding has become part and parcel of our maritime jurisprudence.*" But its harshness was averted by the practice in admiralty of drawing on the state wrongful death statutes to furnish remedies for federal maritime torts." (Emphasis supplied) In *The*

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[5] Prior to *The Tungus* v. *Skovgaard*, supra, Mr. Justice Brennan had occasion to outline the basis of liability for unseaworthiness in *Kernan* v. *American Dredging Co.*, 355 U.S. 426, 428, involving the Jones Act, in which he stated:

"[The] remedy for unseaworthiness derives from the general maritime law, and that law recognizes no cause of action for wrongful death whether occasioned by unseaworthiness or by negligence. *The Harrisburg*, 119 U.S. 199; see *Western Fuel Co.* v. *Garcia*, 257 U.S. 233, 240. Before the Jones Act, federal courts of admiralty resorted to the various state death acts to give a remedy for wrongful death. *The Hamilton*, 207 U.S. 398; *The Transfer No. 4*, 61 F. 364; see *Western Fuel Co.* v. *Garcia*, supra, at 242; *Great Lakes Dredge & Dock Co.* v. *Kierejewski*, 261 U.S. 479. The Jones Act created a federal right of action for the wrongful death of a seaman based on the statutory action under the Federal Employers' Liability Act. In *Lindgren* v. *United States*, 281 U.S. 39, the Court held that the Jones Act remedy for wrongful death was exclusive and precluded any remedy for wrongful death within territorial waters, based on unseaworthiness, whether derived from federal or state law. The petitioner assumes that under today's general maritime law the personal representative of a deceased seaman may elect, as the seaman himself may elect, between an action based on the FELA and an action, recognized in *The Osceola*, 189 U.S. 158, 175, based upon unseaworthiness. In view of the disposition we are making of this case, we need not consider the soundness of this assumption. . . .

"In denying the claim the lower courts relied upon their views of general tort doctrine. It is true that at common law the liability of

Tungus case, supra, the decedent was not a seaman, but an employee of an oil company, working on the ship; and his death did not occur on the high seas, thereby excluding the Death on the High Seas Act, if that statute had otherwise been applicable. It was held in *The Tungus case* that a claim for unseaworthiness was encompassed by the New Jersey Wrongful Death Act, which could be applied by a court in admiralty; and it was pointed out by Mr. Justice Stewart, speaking for the court: "Although Congress has enacted legislation, notably the Jones Act and the Death on the High Seas Act, providing for wrongful death actions in a limited number of situations, *no federal statute is applicable to the present case.*" (Emphasis supplied) The court accordingly applied the New Jersey Wrongful death statute and concluded that a claim for unseaworthiness, because of the negligent failure on the part of the ship and owner to provide plaintiff's decedent with a reasonably safe place to work, was encompassed by the New Jersey Wrongful Death Act, which gave a right of action for "death by wrongful act." Mr. Justice Stewart, however, during the course of his opinion in *The Tungus case*, stated: "We begin as did the Court of Appeals with the established principle of maritime law that in the absence of a statute there is no action for wrongful death. *The Harrisburg*, 119 U.S. 199." (p. 590)

What the Jones Act established was a modification of the prior maritime law, and a new rule of general application in reference to the liability of owners of vessels for

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the master to his servant was founded wholly on tort rules of general applicability and the master was granted the effective defenses of assumption of risk and contributory negligence. This limited liability derived from a public policy, designed to give maximum freedom to infant industrial enterprises, 'to insulate the employer as much as possible from bearing the 'human overhead' which is an inevitable part of the cost—to someone—of the doing of industrialized business.' *Tiller* v. *Atlantic Coast Line R. Co.*, 318 U.S. 54, 59. But it came to be recognized that, whatever the rights and duties among persons generally, the industrial employer had a special responsibility toward his workers, who were daily exposed to the risks of the business and who were largely helpless to provide adequately for their own safety. Therefore, as industry and commerce became sufficiently strong to bear the burden, the law, the reflection of an evolving public policy, came to favor compensation of employees and their dependents for the losses occasioned by the inevitable deaths and injuries of industrial employment, thus shifting to industry the 'human overhead' of doing business. For most industries this change has been embodied in Workmen's Compensation Acts. In the railroad and shipping industries, however, the FELA and Jones Act provide the framework for determining liability for industrial accidents."

injuries to seamen; it superseded all state legislation on that subject; and the right of action given by the Jones Act to the personal representative to recover damages *for and on behalf of designated beneficiaries* for the death of a seaman when caused by negligence, is exclusive, and precludes a right of recovery of indemnity for the death by reason of the unseaworthiness of the vessel, irrespective of negligence, notwithstanding that right might be predicated upon the death statute of the State in which the injury was received. *Lindgren* v. *United States*, 281 U.S. 38.

While any seaman who shall suffer personal injury in the course of his employ may, at his election, maintain actions under the maritime law to recover for personal injuries occasioned by the unseaworthiness of the vessel, and under the Jones Act, for injuries caused by negligence, nevertheless, the personal representative of a deceased seaman had no right of action under the prior maritime law; and therefore, the right of action given a personal representative, under the Jones Act, to recover damages for the seaman's death when caused by negligence, for and on behalf of designated beneficiaries, is necessarily exclusive and precludes the right of recovery of indemnity for his death by reason of the unseaworthiness of the vessel.[6] It is clear that, so long as Congress had not exercised the power given it under the commerce clause of the Constitution with respect to the liability in such cases, the states might occupy the field; but as soon as Congress acted, the legislation of the states was superseded, and that of Congress became supreme and exclusive. Congress, having exercised the power given to it under the commerce clause of the Constitution, by enacting the Jones Act, covering fully the right of the personal representative of a seaman to recover from an employer for injury resulting in death, thereby superseded all state legislation bearing upon the subject. *United States* v. *Lindgren*, 28 F. 2d 725 (C.A. 4).[7]

[6] It is to be noted that an injured seaman cannot be required to exercise an election between his remedies for negligence under the Jones Act and for unseaworthiness. *McAllister* v. *Magnolia Petroleum Co.*, 357 U.S. 221, 222.

[7] See *The Minnesota Rate Cases*, 230 U.S. 352, 408, 409, in which Mr. Justice Hughes, speaking for the Court, said:

"Interstate carriers, in the absence of Federal statute providing a different rule, are answerable according to the law of the State for nonfeasance or misfeasance within its limits. . . . Until the enactment by Congress of the act of April 22, 1908, c. 149, 35 Stat. 65, the laws of the States determined the liability of interstate carriers [to]

In *Turcich* v. *Liberty Corp.*, 119 Fed. Supp. 7, 11 (E.D. Pa.), in an order denying a new trial, the District Court discussed unseaworthiness occasioned by negligence as well as the absolute duty to see that the vessel was seaworthy, for the breach of which, without regard to negligence, the injured seaman might recover, since the general maritime law makes the owners liable for such losses. But the court went on to say that the doctrine of unseaworthiness as announced by the Supreme Court, related only to the seaman's own right to recover for personal injuries occasioned by the unseaworthiness of the vessel, and conferred no right whatever upon his personal representative to recover indemnity for his death; and that, until the Jones Act, there was no Federal right of action for the wrongful death of a seaman caused by negligence. The court, however, pointed out:

> "The gist or gravamen of an action under the Jones Act is negligence. In order to maintain an action under the Act, the seaman or his personal representative must allege and prove negligence, for unless the seaman or his personal representative can establish negligence of the owners of the vessel or her officers, agents or employees, no liability exists. The negligence of the owners of the vessel may consist in the failure to supply and maintain a seaworthy vessel, properly equipped and manned or the negligence of the master or members of the crew, as provided in the Act."

The survival provisions of the Jones Act apply to an action brought by the personal representative of a deceased seaman, whose death was occasioned by a shipowner's negligent failure to comply with the absolute duty to furnish a seaworthy vessel. *Fall, Admx.* v. *Esso Standard Oil Company*, 297 F. 2d 411, 417 (C.A. 5). Moreover, in

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railroad for injuries received by their employes while engaged in interstate commerce, and this was because Congress, although empowered to regulate the subject, had not acted thereon. In some States the so-called fellow-servant rule obtained; in others, it had been abrogated; and it remained for Congress, in this respect and in other matters specified in the statute, to establish a uniform rule." See also *Southern Pacific Co.* v. *Jensen*, 244 U.S. 205, 216, defining and giving instances as to how far the general maritime law may be changed or affected by state legislation. In *Kibadeaux* v. *Standard Dredging Co.*, 81 F. 2d 670, 672 (C.A. 5), Judge Sibley referred to these instances as "vexing distinctions."

Kernan, Adm'r. v. *American Dredging Company*, 355 U.S. 426, the court held that, under the Jones Act, which incorporates the provisions of the Federal Employers' Liability Act, a seaman's employer was liable, without a showing of negligence, for his death resulting from a violation of the Coast Guard regulations pertaining to navigation. In arriving at this conclusion, the court referred to the fact that its decisions under the Federal Employers' Liability Act, based upon violations of the Safety Appliance Act or the Boiler Inspection Act, established that a violation of either Act created liability without regard to negligence, if the violation, in fact, contributed to the death or injury, irrespective of whether the injury flowing from the breach was the injury which the statute sought to prevent; and that the Jones Act expressly provided for seamen the cause of action—and consequently the entire judicially developed doctrine of liability—granted to railroad workers under the Federal Employers' Liability Act.

Plaintiff-appellant submits that the statement of the court in *Lindgren* v. *United States*, 281 U.S. 38, that the personal representative of a deceased seaman could not, under the general maritime law, recover indemnity for the death of a seaman, was only dicta; and appellant refers to the remark of Mr. Justice Brennan in *The Tungus* v. *Skovgaard*, 358 U.S. 588, 606, in his opinion, concurring in part, and dissenting in part, in which he says that the opinion in *Lindgren* v. *United States*, supra, "dealt primarily with the effect of the Jones Act's wrongful death provision in removing the seaman's right to invoke the remedies of state Death Acts for the identical gravamen of negligence. And, although the libel did not allege unseaworthiness, the Court briefly observed that the Jones Act's death provision would be construed equally as foreclosing a state statute's use on that count." It is true that the libel in the *Lindgren* case did not allege unseaworthiness; but the matter was there before the court, since decedent left no survivors entitled to maintain an action under the Jones Act, and counsel for the administrator urged, in the language of the opinion of the court, "that the right of action given the personal representative by the Merchant Marine Act is not exclusive, and that it neither supersedes the right of action given him by the death statute of the State in which the injury was sustained, nor precludes his right to recover indemnity for the death under the old

admiralty rules on the ground that the injuries were occasioned by the unseaworthiness of the vessel." The court said, however, "These contentions cannot be sustained."

It does not appear that the language in the *Lindgren case*, referred to by counsel for appellant, was dicta, for the reason that the matter was before the court, in the *Lindgren case*; was argued before the court; and was passed upon by the court. Moreover, the Supreme Court in *The Tungus case*, supra, declared that it was an established principle of maritime law that, "in the absence of a statute there was no action for wrongful death" (p. 590); and in *Kernan* v. *American Dredging Company*, 355 U.S. 426, the court said that the remedy for unseaworthiness derives from the general maritime law, and that law recognizes no cause of action for wrongful death, whether occasioned by unseaworthiness or by negligence. (p. 428) The Court of Appeals for the Fifth Circuit on this point observed: "We feel compelled to hold that the general maritime law, unaided by the Jones Act, anomalously, archaically, unnecessarily in terms of general principles, gives (plaintiff) no right of action." *Fall, Adm'x.* v. *Esso Standard Oil Co.*, 297 F. 2d 411, 417.

We are of the view that the right of plaintiff-appellant rests solely on the Jones Act.[*] As administratrix of the deceased seaman, she would have had no right of action for negligence, or under the general maritime law for unseaworthiness, resulting in his death, prior to the Jones Act. That statute gave an action for damages for death resulting from negligence, and the damages were limited to the deceased employee's "personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next-of-kin dependent upon such employee. . . ." As Judge John J. Parker said in *United States* v. *Lindgren*, 28 F. 2d 725, 727: "The statute which was thus incorporated into the maritime law, and which conferred upon the injured seaman, or his representative, if his injury resulted in death, rights which might be enforced either in an action at law or a suit in admiralty, clearly provides that there can be a recovery in

[*] It is to be emphasized that the Jones Act gives an action for damages for death resulting from negligence as well as for death, without regard to negligence, where a violation of statutes or regulations contributes to the death. *Kernan* v. *American Dredging Co.*, 355 U.S. 426.

case of death only where there is a showing of dependency. . . . And, in the light of the authorities cited above, we think that the statute must be deemed exclusive and to supersede all state legislation bearing upon the subject."

Counsel for plaintiff-appellant argues that the rule in *Lindgren* v. *United States*, supra, is to be disregarded on the ground that it has become eroded, overrun by the decided cases in contiguous areas, and that the Supreme Court has already indicated that it will determine in the future that an action will lie for the wrongful death of a seaman caused by unseaworthiness, without regard to the Jones Act. To buttress this contention, counsel refers to *Kernan* v. *American Dredging Co.*, 355 U.S. 426, 429-430, where the court, speaking through Mr. Justice Brennan, said:

> "The petitioner assumes that *under today's general maritime law* the personal representative of a deceased seaman may elect, as the seaman himself may elect, between an action based on the FELA and an action, recognized in *The Osceola*, 189 U.S. 158, 175, based upon unseaworthiness. *In view of the disposition we are making of this case, we need not consider the soundness of this assumption.*" (Emphasis supplied)

It is submitted that the foregoing indicates that the court may now be considering the reversal of the rule that the personal representative of a deceased seaman is limited to damages under the Jones Act, and that he may, in the future, bring an action based upon unseaworthiness under the general maritime law. See *Schlichter* v. *Port Arthur Towing Co.*, 288 F. 2d 801, 806 (C.A. 5); see also Mr. Justice Brennan's opinion, dissenting in part and concurring in part, in *The Tungus* v. *Skovgaard*, 358 U.S. 588, 597, 611, to which reference was made in *Fitzgerald* v. *United States Lines*, . . . U.S. . . . (decided June 10, 1963). However, if the prior rule is no longer accepted by the Supreme Court, and *Lindgren* v. *United States*, supra, is to be overruled, the landmarks must be plainer to see; and it would be unbecoming for this Court to base its determination upon the assumption that the holding in *Lindgren* is to be reversed. It has been said that *The Harrisburg*, 119 U.S. 199, "was decided long before the cause of action for unseaworthiness reached its present mature state, recognized as being federal in its origin and incidents."

Justice Brennan's opinion, dissenting in part, and concurring in part in *The Tungus* v. *Skovgaard*, 358 U.S. 588, 605. In the same case, Mr. Justice Brennan also said: "Admiralty law is primarily judge-made law. The federal courts have a most extensive responsibility of fashioning rules of substantive law in maritime cases. (p. 611)" [9] But he added that the holding that, in the absence of an appropriate statute, there was no civil remedy for wrongful death, "*has become part and parcel* of our maritime jurisprudence." (Emphasis supplied) This, it is to be remarked, was subsequent to the *Kernan case*, upon which plaintiff-appellant places such store. In *Mitchell* v. *Trawler Racer, Inc.*, 362 U.S. 539, 550, Mr. Justice Frankfurter, in the course of a dissenting opinion, remarked: "No area of federal law is judge-made at its source to such an extent as is the law of admiralty"; and in *Fitzgerald* v. *United States Lines*, supra, Mr. Justice Black said that: [10] "Article III of the Constitution vested in the federal courts jurisdiction over admiralty and maritime cases, and since that time, the Congress has largely left to this court the responsibility for fashioning the controlling rules of admiralty law." [11] Nevertheless, when Congress has exercised its powers in the admiralty and maritime field, such as in the enactment of the Jones Act, that statute would seem controlling whatever may be other developments of judge-made admiralty or maritime law. This conclusion would appear to follow since Congress has acted in a specific field; has provided a special remedy and no other; and has restricted recovery of damages to designated dependent bene-

[9] Such a responsibility is, perhaps, not limitless. In *Southern Pacific Co.* v. *Jensen*, 244 U.S. 205, 221, Mr. Justice Holmes observed: "I recognize without hesitation that judges do and must legislate, but they can do so only interstitially; they are confined from molar to molecular motions. A common-law judge could not say I think the doctrine of consideration a bit of historical nonsense and shall not enforce it in my court. No more could a judge exercising the limited jurisdiction of admiralty say I think well of the common-law rules of master and servant and propose to introduce them here *en bloc*."

[10] In the *Fitzgerald case* the court said that the Seventh Amendment did not require jury trials in admiralty cases, nor did that amendment nor any other provision of the Constitution forbid them; nor did any statute of Congress or Rule of Procedure, Civil or Admiralty, forbid jury trials in maritime cases. The court held that a seaman was entitled to a jury trial on a maintenance and cure claim joined with a claim for Jones Act negligence when both arose out of the same facts. The proposition is now established, but the difficulties in arriving at such a determination are evidenced in the dissenting opinion of Mr. Justice Harlan, and the three differing opinions of the Court of Appeals of the Second Circuit, whose decision was reversed.

ficiaries. Moreover, it is to be observed that in the *Kernan case*, it was held that liability for the death of the seaman depended entirely on the Jones Act; in *The Tungus case*, the decedent was not a seaman and had no rights under the Jones Act; and in the *Fitzgerald* case, the claim was, under the Jones Act, for damages resulting in injuries to a seaman. None of these cases was for indemnity for the death of a seaman, occasioned by unseaworthiness, under the general maritime law, or under a state Wrongful Death Act; and what is said in these cases can hardly be taken to mean that the heretofore settled law is to be overruled, and that a personal representative has a right of action for indemnity for the death of a seaman occasioned by an unseaworthy vessel, under the maritime law, and also under a state Wrongful Death Act, as well as under the Jones Act.

In the Jones Act, Congress gave a federal right of action to the personal representative of a seaman whose death resulted from negligence, for the benefit of specified dependents. No such right had previously existed. Congress having, by the Jones Act, pre-empted the field relating to recovery of damages for the death of a seaman, that statute must be deemed to supersede all state legislation bearing on the subject and to be the exclusive remedy in such a case.

It is to be noted that all of the allegations of the complaint upon which plaintiff bases her claim for indemnity constitute assertions of negligence. As plaintiff, in her complaint, states: "As a proximate result of the negligence of the defendant as described in detail below, decedent lost his life by drowning." Whether the negligence was failure to provide safe access to the ship for plaintiff's decedent, or whether the negligence was a breach of defendant's duty to provide a seaworthy ship, the action is based upon negligence and proximate cause, and, on the proof thereof, plaintiff would be entitled to a judgment. As personal representative of her decedent, plaintiff could maintain the suit and recover under the Jones Act. The only difference between a recovery under the Jones Act and a recovery under the maritime law for unseaworthiness, or under the Ohio Wrongful Death Act, is that, under the Jones Act, the recovery is limited to certain designated dependent beneficiaries, as provided by that statute, and under the maritime law and the Ohio Wrongful Death Act, other persons,

including dependents or non-dependents would have rights of indemnity.

In accordance with the controlling adjudications and in the light of the circumstances disclosed in this case, the exclusive remedy for indemnity for the death of plaintiff's decedent is through an action brought by the personal representative under the Jones Act. Because of such exclusive remedy, petitioners in Case No. 15,389 have no right of action under the general maritime law for unseaworthiness or under the Ohio Wrongful Death Act. Having no such rights, the hardship rule applicable to interlocutory orders, resulting in their being considered as appealable orders, would not, in any event, be relevant.

Under the foregoing circumstances, the need for the issuance of a writ of mandamus, injunction, or granting of a petition for other extraordinary remedy, under given appropriate circumstances, disappears. As heretofore said, ordinarily, we would not have reached the merits of this controversy except after a hearing of the appeal. However, because of petitioners' prayer for extraordinary relief, we have duly examined all the related questions, and also because of plaintiff's and petitioners' request and consent, we have considered and determined the controversy on the merits as though it were submitted on an appeal; and our determination is not prejudicial to appellee and respondent, who have not so consented. It is our conclusion that an order be entered in Case No. 15,389 denying the petition for a writ of mandamus, injunction, or other extraordinary relief; that an order be entered in Case No. 15,383 denying the motion to dismiss the appeal; and that the order of the District Court, striking from appellant's complaint the allegations relating to the general maritime law doctrine of unseaworthiness, and the allegations relating to the Ohio Wrongful Death Act, be affirmed.

[fol. 63] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 64]

SUPREME COURT OF THE UNITED STATES

No. 582—October Term, 1963

MABEL GILLESPIE, Administratrix, etc., Petitioner,

vs.

UNITED STATES STEEL CORPORATION.

ORDER ALLOWING CERTIORARI—January 6, 1964

The petition herein for a writ of certiorari to the United States Court of Appeals for the Sixth Circuit is granted, and the case is placed on the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

In the Supreme Court of the United States

OCTOBER TERM, 1963.

No. [redacted] 10

MABEL GILLESPIE,
Administratrix of the Estate of Daniel E. Gillespie,
Deceased,
Petitioner,

vs.

UNITED STATES STEEL CORPORATION,
a corporation,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals
For the Sixth Circuit.

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In the Supreme Court of the United States

OCTOBER TERM, 1963.

No. _____.

MABEL GILLESPIE,
Administratrix of the Estate of Daniel E. Gillespie, Deceased,
Petitioner,

vs.

UNITED STATES STEEL CORPORATION,
a corporation,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals
For the Sixth Circuit.

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit, entered in the above entitled case on July 29, 1963, printed in Appendix C hereto, *infra*, at p. 39.

THE OPINIONS BELOW.

The district court opinion is unreported and is printed in Appendix C hereto, *infra*, at pp. 37-38. The opinion of the Sixth Circuit Court of Appeals is also unreported and a copy has been attached as a part of Appendix C, following page 39 hereof.

JURISDICTION.

The judgment of the United States Court of Appeals for the Sixth Circuit was entered in the subject case on July 29, 1963, affirming the order of the United States District Court for the Northern District of Ohio, Eastern Division, which struck from petitioner's complaint all allegations relating to the general maritime law doctrine of unseaworthiness and the Ohio Wrongful Death Act. The jurisdiction of this Court is invoked under 28 U. S. C. Section 1254(1).

QUESTIONS PRESENTED.

I. Whether suit for wrongful death of a deceased seaman may be maintained against his employer under the general maritime law doctrine of unseaworthiness and the state statute which provides a remedy for wrongful death, where the death occurred in state waters.

II. Whether the classes of beneficiaries named in the Jones Act are mutually exclusive, so that, in a wrongful death action, the existence of a person in one such class precludes recovery by persons in the other class.

III. Whether a claim for conscious pain and suffering against his employer survives the death of a seaman, where the period of pain and suffering for which compensation is claimed is short and immediately preceded his death by drowning.

STATUTES INVOLVED.

The statutes involved are Section 33 of the Merchant Marine Act of 1920, 41 Stat. 1007, 46 U. S. C. Section 688, incorporating the Federal Employers' Liability Act, 45 U. S. C. Section 51, the Ohio Wrongful Death Act, Ohio Revised Code Sections 2125.01 and 2125.02, and the Ohio Survival Statute, Ohio Revised Code Section 2305.21. They are reprinted in Appendix A, *infra*, at pp. 22-25.

STATEMENT OF THE CASE.

Petitioner, Mabel Gillespie, as administratrix of the estate of her deceased son, Daniel E. Gillespie, filed an amended complaint in the District Court against the Respondent, United States Steel Corporation, for damages arising out of the death of her decedent in Ohio waters while employed by the Respondent as a seaman and a member of the crew of one of Respondent's steamships, engaged in transportation as a cargo carrier on the Great Lakes (25-30). Jurisdiction of the district court was invoked because the complaint raised questions under a law relating to admiralty and commerce, the Merchant Marine Act of 1920 (Jones Act) and the general federal maritime law. Petitioner's amended complaint sought recovery (1) for herself as dependent mother of the decedent, and for the benefit of her children, dependent sisters and brother of the decedent, for *wrongful death*, and (2) for the estate of the decedent for his *conscious pain and suffering* immediately prior to his death by drowning (29-30). She sought recovery for wrongful death on alternate grounds of (1) the Merchant Marine Act of 1920 (Jones Act), and (2) the general maritime law of unseaworthiness coupled with the Ohio Wrongful Death Act, and for decedent's conscious pain and suffering based upon the alternate theories of liability of (1) the

survival provisions of the Merchant Marine Act of 1920 (Jones Act), and (2) the general maritime law of unseaworthiness coupled with the Ohio Survival Statute.

Respondent filed a motion requesting the trial court to strike all allegations relating to the general maritime doctrine of unseaworthiness, the Ohio Wrongful Death and Survival Statutes, and the dependent sisters and brother of the decedent as beneficiaries, from the complaint (30-32). The district court granted Respondent's motion to strike in its entirety (38).

Petitioner appealed from this order to the Sixth Circuit Court of Appeals. Respondent filed a motion to dismiss the appeal on the ground that the order appealed from was not final and appealable. Before the Court of Appeals heard the motion to dismiss, Petitioner and the other named beneficiaries for whom she sued filed a petition for extraordinary relief in the event that the Court of Appeals should rule that the order of the district court from which appellate relief was sought was not final and appealable (32-36). Both the appeal and the application for extraordinary relief were consolidated in the Court of Appeals (38).

With the appellate proceedings in this posture, the Court of Appeals ruled as follows:

(1) The court denied the Respondent's motion to dismiss the appeal (38).

(2) The court affirmed the order of the district court below on its merits (39).

(3) The court denied the petition for extraordinary relief (39).

It is the affirmance on its merits of the district court order below from which Petitioner seeks relief by this petition for certiorari.

REASONS FOR GRANTING THE WRIT.

I.

The opinion of the Sixth Circuit Court of Appeals from which Petitioner here seeks relief is based upon, and revitalizes, the position taken by this Court in *Lindgren v. United States*, 281 U. S. 38 (1930), that the Jones Act[1] provides the exclusive remedy for death of a seaman against his employer and that therefore the unseaworthiness of the vessel, irrespective of negligence, is unavailable as an alternate basis for recovery for the seaman's death, even though such claim is predicated upon the wrongful death statute of the state in which the injury causing death occurred.

In response to the Petitioner's contention in the court below that the position taken in *Lindgren* on this point is unsound, and has been eroded by more recent decisions of this Court in contiguous areas, the Court of Appeals remarked:

> "* * * if the prior rule is no longer accepted by the Supreme Court, and *Lindgren v. United States* * * * is to be overruled, the landmarks must be plainer to see; and it would be unbecoming for this Court to base its determination upon the assumption that the holding in *Lindgren* is to be reversed." (Page 18, Court of Appeals' Opinion, Appendix C.)

Petitioner contends that at its inception the rule in *Lindgren* on this point was indefensible logically, that subsequent experience has stripped *Lindgren* of any vitality it may have had, and that this case presents a long overdue opportunity to this Court to re-examine and discard an unjust, unwarranted and overly-harsh rule delineating the rights of survivors of a seaman whose death resulted from a maritime tort.

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[1] Section 33 of the Merchant Marine Act of 1920, 46 U. S. C. § 688.

Prior to the enactment of the Jones Act, the courts had established that the general maritime doctrine of unseaworthiness *did* provide a theory of recovery for wrongful death, both in seamen's suits against their employers and otherwise, by utilizing the state wrongful death statute in whose jurisdiction the death occurred to supply a remedy for death to complement the substantive general maritime doctrine of unseaworthiness. *The Hamilton*, 207 U. S. 398 (1907); *Great Lakes Dredge & Dock Co. v. Kierejewski*, 261 U. S. 479 (1923); and see *Cortes v. Baltimore Insular Line*, 287 U. S. 367, 371 (1932); *Western Fuel Co. v. Garcia*, 257 U. S. 233 (1921).

Moreover, both the Jones Act and the Death on the High Seas Act, 41 Stat. 537, 46 U. S. C. Section 761-768, which provided a remedy for wrongful death where the death occurred beyond a marine league from state shores, were enacted in 1920 at the same session of Congress. That this act was intended by *the same Congress that enacted the Jones Act* to fill a void in wrongful death recovery and to *supplement* the state wrongful death remedies rather than *eliminate* them is clearly demonstrated by the express statutory direction in the Death on the High Seas Act "that the provisions of any state statute giving or regulating rights of action or remedies for death *shall not be affected by this Act.*" (emphasis supplied.) Accord: *Western Fuel Co. v. Garcia*, 257 U. S. 233, 243 (1921).[2]

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[2] And see Mr. Justice Stewart's language in the majority opinion in *The Tungus, et al. v. Skovgaard*, 358 U. S. 588, 593 (1959):

> "The legislative history of the Death on the High Seas Act discloses a clear congressional purpose to leave 'unimpaired the rights under state statutes as to deaths on waters within the territorial jurisdiction of the States.' S. Rep. No. 216, 66th Cong., 1st Sess. 3; H. R. Rep. No. 674, 66th Cong. 2d Sess. 3. The record of debate in the House of Representatives preceding passage of the bill reflects deep concern that the power of the States to create actions for wrongful death in no way be affected by enactment of the federal law. 59 Cong. Rec. 4482-4486."

It is evident that the Jones Act was enacted to *enhance* rather than *diminish* the rights of the seaman and his personal representative in the event of his injury or death in the course of his employment. As Justice Brennan, speaking for Chief Justice Warren and Justices Black, Douglas and Clark in *Kernan, Adm'x. v. American Dredging Co.*, 355 U. S. 426, 431-432 (1959), has described the background of the enactment of such special industrial legislation as the Federal Employers' Liability Act, and the Jones Act, into which the F. E. L. A. is specifically incorporated:

> "It is true that at common law the liability of the master to his servant was founded wholly on tort rules of general applicability and the master was granted the effective defenses of assumption of risk and contributory negligence. This limited liability derived from a public policy, designed to give maximum freedom to infant industrial enterprises, 'to insulate the employer as much as possible from bearing the 'human overhead' which is an inevitable part of the cost—to someone—of the doing of industrialized business.' *Tiller v. Atlantic Coast Line R. Co.*, 318 U. S. 54, 59. But it came to be recognized that, whatever the rights and duties among persons generally, the industrial employer had a special responsibility toward his workers, who were daily exposed to the risks of the business and who were largely helpless to provide adequately for their own safety. Therefore, as industry and commerce became sufficiently strong to bear the burden, the law, the reflection of an evolving public policy, came to favor compensation of employees and their dependents for the losses occasioned by the inevitable deaths and injuries of industrial employment, thus shifting to industry the 'human overhead' of doing business. For most industries this change has been embodied in Workmen's Compensation Acts. In the railroad and shipping industries, however, the FELA and Jones Act provide the framework for determining liability for industrial accidents. But instead of a detailed statute codifying com-

> mon law principles, Congress saw fit to enact a statute of the most general terms, thus leaving in large measure to the courts the duty of fashioning remedies for injured employees in a manner analogous to the development of tort remedies at common law. *But it is clear that the general congressional intent was to provide liberal recovery for injured workers, Rogers v. Missouri Pacific R. Co.*, 352 U. S. 500, 508-510, and *it is also clear that Congress intended the creation of no static remedy, but one which would be developed and enlarged to meet changing conditions and changing concepts of industry's duty toward its workers.*" (Emphasis supplied.)

In this context came *Lindgren v. United States*, 281 U. S. 38 (1930). Although this was solely a Jones Act death case in which unseaworthiness was never pleaded as a basis for liability, the Court took occasion to remark that the Jones Act wrongful death remedy was exclusive and precluded recovery for death by reason of the unseaworthiness of the vessel.

Justice Brennan, concurring in part and dissenting in part on other facts in *The Tungus et al. v. Skovgaard, Adm'x*, 358 U. S. 588, 606 (1959), acknowledged that the proposition of *Lindgren* upon which Respondent and the court below rely was *obiter*:

> "The opinion [in *Lindgren v. United States*] dealt primarily with the effect of the Jones Act's wrongful death provision in removing the seaman's right to invoke the remedies of state Death Acts for the identical gravamen of negligence. And, *although the libel did not allege unseaworthiness*, the Court *briefly observed* that the Jones Act's death provision would be construed equally as foreclosing a state statute's use on that count." (Emphasis supplied.)

This *dictum* in *Lindgren*, neither called for by the issues in the case nor responsive to the demonstrated congressional

intent and federal statutory enactments, has, it is true, been followed by some inferior federal courts, but even those courts which unjustifiably, in Petitioner's view, have felt bound by it, have followed it protestingly, haltingly, and crying out against its logical barrenness and basic injustice. E.g., *Fall, Adm'x. v. Esso Standard Oil Co.*, 297 F. 2d 411, 417 (5th Cir. 1961):

> "We feel compelled to hold that the general maritime law, unaided by the Jones Act, *anomalously, archaically, unnecessarily* in terms of general principles, gives [plaintiff] no right of action." (Emphasis supplied.)

And in *Gill v. United States*, 184 F. 2d 49, 57 (2nd Cir. 1950), Judge Learned Hand attacked the logical basis of the dictum in *Lindgren* with unassailable force:

> "Is a vessel owner liable for a seaman's * * * death within the territorial waters of a state, when it is caused by the unseaworthiness of the vessel? I have no doubt that the death was owing to the respondent's 'wrongful act, neglect or default,' as the New Jersey Act uses those words; but in *Lindgren v. United States*, 281 U. S. 38 * * *, the Supreme Court held that the Jones Act, 46 U. S. C. A. § 688, superseded a state statute creating such a claim. * * * Since then, the Court has indeed decided that a seaman may recover for injuries suffered from the ship's unseaworthiness, *Mahnich v. Southern S. S. Co.*, 321 U. S. 96, 100 * * *, and the same is true of longshoremen, *Seas Shipping Co., v. Sieracki*, 328 U. S. 85 * * * I find it hard to understand why the rationale of *Lindgren v. United States, supra*, ought not to have forbidden recovery in either of these instances. If the Jones Act 'covers the entire field of liability for injuries to seamen' and 'is paramount and exclusive,' why does it not supersede injuries arising from unseaworthiness which do not result in death, as well as

> those which do? * * * *Yet I must own to the greatest doubt whether the Court would today so hold.*" (Emphasis supplied.)

Nor have subsequent decisions of this Court added luster to the precedent value of *Lindgren*. Although the Court has not decided a case dealing specifically with the question of whether a seaman's death action may be brought on both Jones Act and unseaworthiness counts,[3] a number of subsequent decisions of this Court in contiguous areas have cast serious doubt upon *Lindgren* as binding legal authority today.

While the rationale of *Lindgren* was based upon the view that a seaman was required to 'elect' whether to pursue a negligence recovery under the Jones Act or recover under the general maritime doctrine of unseaworthiness, this rug has been pulled from under *Lindgren's* feet as well. Since that case was decided, it has become clear that a seaman need *not* elect between Jones Act negligence and unseaworthiness, but may proceed to judgment alternatively on both and his verdict will be sustained on appeal if there is no demonstrable prejudicial error as to one of them. *McAllister v. Magnolia Petroleum Co.*, 357 U. S. 221 (1958).

Moreover, wrongful death actions may be maintained against the vessel owner by representatives of deceased

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[3] The closest it has come to considering this point since *Lindgren* is in *Kernan, Adm'r. v. American Dredging Co.*, 355 U. S. 426, 429 (1958):

> "The petitioner assumes that under today's general maritime law the personal representative of a deceased seaman may elect, as the seaman himself may elect, between an action based on the FELA and an action, recognized in *The Osceola*, 189 U. S. 158, 175, based upon unseaworthiness. *In view of the disposition we are making of this case, we need not consider the soundness of this assumption.*" (Emphasis supplied.)

employees for negligent failure to comply with the absolute duty to furnish a seaworthy vessel[4] and for non-negligent violations of coast guard regulations.[5]

An action against the vessel owner based upon the applicable state wrongful death statute and the general maritime doctrine of unseaworthiness may be maintained for death of a *non-seaman* employed aboard a vessel at the time of his death.[6] Nor does the Jones Act provide such an exclusive remedy to seamen as to preclude recovery for unseaworthiness for a seaman's personal injury if his injuries are not severe enough to cause his death.[7] Claims against a shipowner-employer based upon unseaworthiness for conscious pain and suffering for injuries accrued prior to the decedent-seaman's death survive.[8] Claims for maintenance and cure survive the death of the seaman.[9] And the intentions of this Court to grant similar remedies for substantive rights arising out of the same maritime wrong has been very recently demonstrated.[10]

As a consequence of these holdings, there remains but one set of facts in which all general maritime rights are

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[4] *Michalic v. Cleveland Tankers*, 364 U. S. 325 (1960); *Vickers dba Delta Towing Co. v. Turney*, 290 F. 2d 426 (5th Cir. 1961); *Fall, Adm'x v. Esso Standard Oil Co.*, 297 F. 2d 411 (5th Cir. 1961).

[5] *Kernan, Adm'x. v. American Dredging Co.*, 355 U. S. 426 (1958).

[6] *The Tungus et al. v. Skovgaard, Adm'x*, 358 U. S. 588 (1959).

[7] *Mahnich v. Southern S. S. Co.*, 321 U. S. 96, 100 (1944); *Seas Shipping Co. v. Sieracki*, 328 U. S. 85 (1946).

[8] *Holland v. Steag, Inc.*, 143 F. Supp. 203 (D. Mass. 1956); cf. *Just v. Chambers*, 312 U. S. 383 (1941).

[9] *Sperbeck v. A. L. Burbank & Co.*, 190 F. 2d 449 (2nd Cir. 1951).

[10] *Fitzgerald v. United States Lines Co.*, 31 U. S. L. Week 4626 (June 10, 1963).

not available to the victim of a maritime tort or his beneficiaries. This results only under circumstances, as in the instant case, where *all* of the following factors co-exist:

1. The victim must be injured severely enough to be killed.
2. The victim must be a seaman.
3. The victim's death must have occurred in state waters.
4. Suit must have been filed against the victim's employer.
5. The suit must be for wrongful death.

Thus, only *Lindgren* now stands in the path of the general tort proposition that all the rights which a claimant had before he died are available in some form to his personal representative upon his death.

This observation is not a compulsive plea for legal symmetry for its own sake. The vast philosophic gulf between *Lindgren* and the other decided cases "indicate[s] something wrong at the beginning or that something has become wrong since then. [It] also show[s] that correction, though in process, is incomplete * * *."[11]

The Court of Appeals in this case has, by its order of affirmance, refused to give relief from an anachronistic rule which interprets the Jones Act in such a manner as to diminish seamen's rights rather than to enhance them, and which grants fewer rights to the survivors of a seaman injured severely enough to die as a result of a maritime tort, than to one whose injuries were not so severe as to be fatal. Such patent unfairness, although members of this Court acknowledge that "[a]dmiralty law is primarily judge-made made law" and that "[t]he federal courts

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[11] *Georgetown College v. Hughes*, 130 F. 2d 810, 812 (D. C. Cir. 1942).

have a most extensive responsibility of fashioning rules of substantive law in maritime cases," [12] is justified by the court below, echoing the rationale of *Lindgren*, as follows:

> "Congress having, by the Jones Act, pre-empted the field relating to recovery of damages for the death of a seaman, that statute must be deemed to supersede all state legislation bearing on the subject and be the exclusive remedy in such a case." (Page 20, Court of Appeals' Opinion Appendix C.)

Without again discussing this erroneous interpretation of congressional intent with respect to the Jones Act,[13] the opinion of Mr. Justice Brennan, speaking for Chief Justice Warren and Justices Black and Douglas in another context, provides an abundant reply to the rationale of the Court of Appeals:

> "Though the individual statutes vary in terminology and to an extent in concept, all the States have wrongful death acts * * *. While the course of development of the common law has brought it about that this remedy has always been embodied in a statutory enactment, the existence of such a remedy is now a basic premise of the law of torts administered throughout the country. And with the Death on the High Seas Act and the state statutes, *the federal admiralty law has available a remedy to fashion for the fatal breach of a maritime duty anywhere within its jurisdiction.*
>
> "* * * the duty claimed to have been broken here [breach of duty of seaworthiness] was one grounded in federal law. It would be a strained statement of the effect of *The Harrisburg* [119 U. S. 199 (1886)] to say that there was no duty imposed by the maritime law not to kill persons through breach of the duty of

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[12] Brennan, J., concurring in part and dissenting in part in *The Tungus v. Skovgaard*, 358 U. S. 588, 605 (1959).

[13] See discussion, *supra*, pp. 6-8.

seaworthiness. The libel alleged a condition constituting *a breach of a federally defined duty* and set forth a cause of action under federal law, and this nonetheless because the breach of the federal duty had resulted in death rather than in non-fatal injury. *It is the federal maritime law that looks to the state law of remedies here, not the state law that incorporates a federal standard of care* * * *.

"The court's solution * * * creates potential differences in the availability of a remedy for breach of the federally created duty where the victim dies as opposed to cases where he is injured short of death * * *. I cannot think that any such variation is appropriate or necessary in the enforcement of the cause of action for unseaworthiness * * *. The existence of a remedy for wrongful death has become almost a postulate of our legal system, though the remedy was generally provided by legislation rather than by decisional law. It is against this background that the federal law must look for an appropriate remedy to enforce its duties in a complete and rational way. Cf. *Cox v. Roth*, 348 U. S. 210.

"* * * insofar as [wrongful death acts of states] have as their purpose the effecting of a general and rough equivalency between the duties for breach of which a remedy lies in the case of injuries causing death and those short of it, they can be proper subjects for the flexibility of the federal maritime law in fashioning a remedy for breach of the duty of seaworthiness.

"Admiralty law is primarily judge-made law. The federal courts have a most extensive responsibility of fashioning rules of substantive law in maritime cases * * *. This responsibility places on this Court the duty of assuring that the product of the effort be coherent and rational. Admiralty law is an area where flexibility and creativity have been demonstrated in accomplishing this. * * * the court announces the strange principle that *the substantive rules of law governing human conduct in regard to maritime torts*

> *vary in their origin depending on whether the conduct gives rise to a fatal or a non fatal injury.* I have demonstrated that it does so under no compulsion of binding precedent here or of Act of Congress. *Its anomalous result is purely of its own making.* Certainly the responsibility incumbent upon this court in this area demands more by way of fulfillment than the court has furnished * * *." (Emphasis supplied.)

That such unfair treatment should be limited to seamen, the special wards of the court,[14] while a non-seaman's death action may be based upon the general maritime law, outrages justice, offends history, and requires this Court to re-examine and discard *Lindgren* as a rule of law binding upon the courts below.

To the plea of the Court of Appeals below that "if *Lindgren v. United States* * * * is to be overruled, the landmarks must be plainer to see," this Court ought to respond by providing the clearly visible landmark sought by the court below: a clear rejection of *Lindgren*, and an explicit statement that, in an action against his employer for the wrongful death of a seaman in state waters, the wrongful death statute of the state may be used to provide an effective remedy for the violation of the federal maritime duty to keep vessels seaworthy, notwithstanding any other remedies for negligence under the Jones Act which may be available to his beneficiaries.

Such a result is clearly in the public interest, for so long as seamen are employed extensively in the hazardous industry of transportation by ship, so long as maritime torts occur which cause fatal injuries, so many persons will this Court's ruling affect and so far will the shadow of this Court's ruling extend.

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[14] See, for example, Jackson, J. dissenting in *Pope & Talbot, Inc. v. Hawn*, 346 U. S. 406, 424-425 (1953), pointing out some of the reasons behind the preferential treatment given seamen by the law.

II.

The second question potentially raised by this petition is whether the classes of beneficiaries named in the Jones Act are mutually exclusive so that, in a wrongful death action, the existence of a beneficiary in one such class precludes recovery by persons in the other class.

It is true, of course, that if Petitioner is successful in her contention under [I], *supra*, that the right to claim under general maritime law and the Ohio Wrongful Death Act is available to her, as a practical matter, this question would become less important, because all of the beneficiaries for whom Petitioner originally sued would be restored to the suit by reason of this Court's reversal of the order of the court below. Clearly, if the Ohio Wrongful Death Act (R. C. § 2125.01, *et seq.*), in conjunction with the doctrine of unseaworthiness, is applicable to the instant action, dependent sisters and brothers as well as a dependent mother may participate as beneficiaries in the same wrongful death action. Section 2125.02, Ohio Revised Code, provides that a wrongful death action "shall be for the exclusive benefit of the surviving spouse, the children and *other next of kin* of the decedent" (emphasis supplied), and this language has been interpreted broadly to include brothers and sisters as well as parents, when both classes of kin are in existence, among the beneficiaries of a single wrongful death action. *Karr v. Sixt*, 146 Ohio St. 527 (1946).

It has been demonstrated that where each of several theories of liability permits recovery for a different class of beneficiaries, recovery by one class upon one theory does not bar the other class from an independent recovery on the other. For example, in *The Four Sisters*, 75 F. Supp. 339 (D. Mass. 1947), the decedent-seaman was unmarried, had no children and was survived by a father, a brother

and a sister. The father-administrator brought suit under the Jones Act for the benefit of decedent's dependent sister and himself. After the suit as to the sister was dismissed by the trial court on the ground that the survival of the father precluded Jones Act recovery for the sister because of the mutually exclusive classes of beneficiaries provided by the FELA, the father recovered a Jones Act verdict. After this judgment was satisfied, he brought suit, as administrator, in admiralty for the sister under the Death on the High Seas Act. *Held:* the sister's action was *not* barred by the prior Jones Act recovery of the father. This decision indicates that where, as here, different theories of liability establish the right of different classes of beneficiaries to recover, recovery may be had by one class on one theory and by the other class on another. Furthermore, any procedural impediment to joining both classes of beneficiaries and both theories of liability in a single action has been removed by the decisions since *The Four Sisters, supra,* which permit the joinder of several theories in one action, with no requirement that the plaintiff elect between them. E.g., *McAllister v. Magnolia Petroleum Co.*, 357 U. S. 221 (1958).

It follows that in the case at bar proof of the Petitioner's allegations will permit recovery under the Jones Act to the Petitioner as the decedent's mother, and under the doctrine of unseaworthiness to the other named beneficiaries.

But even if this Court should rule against Petitioner's claim in [I], *supra*, Petitioner contends that under the Jones Act alone, all of the dependent sisters and brother, as well as the mother of the decedent are entitled to participate in the fund created by recovery for their decedent's wrongful death. It is expressly provided by the F. E. L. A., incorporated by reference into the Jones Act,

that in a wrongful death action under the Act, the decedent's personal representative may recover "for the benefit of the surviving widow or husband and children of such employee; *and*, if none, then of such employee's parents; *and*, if none, then of the next of kin dependent upon such employee * * *." (23) (Emphasis supplied.)

It is true that in *C. B. & Q. R. Co. v. Wells-Dickey Trust Co., Admr.*, 275 U. S. 161 (1927) this Court interpreted this language narrowly as providing exclusive classes of beneficiaries. But in *Poff v. Pennsylvania R. Co.*, 327 U. S. 399 (1946), this language was interpreted broadly to provide, rather than to defeat, recovery for beneficiaries. The liberal purposes of the Act require such broad interpretation of this as well as other language in the Jones Act and F. E. L. A.

Although the court in *Wells-Dickey*, without analysis, found the express language of the F. E. L. A. to clearly demonstrate the congressional intent to provide exclusive compartments of beneficiaries, the holding is not merely a *pro forma* reading of the statute; it required judicial interpretation of a greater degree as well—judicial interpretation which might well have reached a contrary result, in view of the liberal construction required of the F. E. L. A. The use of the connective "and" between the classes of beneficiaries rather than "or" suggests strongly that Congress intended the classes to be cumulative rather than exclusive. The words "if none" have meaning under this construction of the statutory language by inserting an elleptical "even" before those words, demonstrating that all subsequently named classes participate as beneficiaries, "even if none" exist in the prior class. As to the question of how a recovery shall be apportioned among such beneficiaries, the probate machinery of each state (which adequately confers status to sue upon a personal representa-

tive under the same federal acts) provides an equitable and adequate solution.

This statutory construction is at least as valid as that which the Court in *Wells-Dickey* applied, and has the additional advantage of conforming to the spirit of the F. E. L. A. and Jones Act and the liberal construction to which these Acts are entitled.

This Court is urged to re-examine *Wells-Dickey* in this light to give effect to the purposes of this social legislation.

III.

The third question raised in this petition for certiorari is whether a claim for conscious pain and suffering survives the death of a seaman, where the period of pain and suffering for which compensation is claimed is short and immediately preceded his death by drowning.

It must be noted that, in addition to her claim for the decedent's *wrongful death* (Paragraph VII, amended complaint, 30-31), Petitioner also seeks recovery for *conscious pain and suffering of the decedent while he was alive.* (Paragraph VI, amended complaint, 29).

Even if Respondent's contention that unseaworthiness is not an available theory of liability in actions for *wrongful death* were correct (which Petitioner denies, see argument [I] above, pp. 5-15), the language in her complaint which refers to the general maritime law, the doctrine of unseaworthiness and the Ohio Survival Statute, Ohio Revised Code, Sec. 2305.21 *et seq.*, should be retained because she has, in the same action, sought relief, in addition, for *conscious pain and suffering.*

Holland v. Steag, 143 F. Supp. 203 (D. Mass. 1956), so holds. In that case the court held that a state survival statute "appears effective * * * to bring about a survival

of the seaman's right under maritime law to recover for personal injuries caused by the unseaworthiness of the vessel." 143 F. Supp. 203, 206. And see *Just v. Chambers*, 312 U. S. 383 (1941), in which it was held that a state survival statute would permit the survival of a maritime action for personal injuries after the death of the tortfeasor, even though, under the maritime law alone, there would have been no such survival.

But the court below concluded that "there would be no substantial basis, in this case, for a separate estimate of pain and suffering," even "[a]ssuming * * * that a right of action were to pass to decedent's relatives under the Ohio Wrongful Death Act," [15] based upon the language in *The Corsair*, 145 U. S. 335, 348 (1892) that where suffering is brief and "substantially contemporaneous" with death, the decedent's "fright for a few minutes is too unsubstantial a basis for a separate estimation of damage." [16] The language of the amended complaint which the court below dismissed in such summary manner referred to "severe personal injuries which caused [decedent] excruciating pain and mental anguish prior to his death" and sought compensation therefor.

If, at trial, Petitioner is unable to sustain her burden of proof on this issue, her claim for compensation for this portion of her suit should fail for that reason. But she should have the opportunity to make such proof of this contention as she can muster without a prejudgment at the pleading stage that her proof must fail. If the language in *The Corsair* is no longer the position of this Court in view of the developments over the past half-century of tort law with reference to compensability of claims for

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[15] P. 7, Court of Appeals Opinion, Appendix C.

[16] P. 8, Court of Appeals Opinion, Appendix C.

pain accompanied by mental anguish since that decision, this case provides an opportunity to say so.

The imperatives of orderly and symmetrical treatment of maritime claims arising out of the same incident[17] require that this Court emancipate itself and the inferior federal courts from the hoary rule of *The Corsair*.

CONCLUSION.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

JACK G. DAY,
BERNARD A. BERKMAN,
Counsel for Petitioner.

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[17] E.g., *Fitzgerald v. United States Lines Co.*, 31 U. S. L. Week 4624 (June 10, 1963).

APPENDIX A.

MERCHANT MARINE ACT OF 1920, SEC. 33.

46 U. S. C. § 688. *Recovery for Injury to or Death of a Seaman.*

Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common law right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such action shall be under the court of the district in which the defendant employer resides or in which his principal office is located.

FEDERAL EMPLOYERS' LIABILITY ACT.

45 U. S. C. § 51. *Liability of Common Carriers by Railroad, in Interstate or Foreign Commerce, for Injuries to Employees from Negligence; Definition of Employees.*

Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her

personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter.

OHIO WRONGFUL DEATH ACT.

Ohio Revised Code. § 2125.01. *Action for Wrongful Death.*

When the death of a person is caused by wrongful act, neglect, or default which would have entitled the party injured to maintain an action and recover damages if death had not ensued, the corporation which or the person who would have been liable if death had not ensued, or the administrator or executor of the estate of such person, as such administrator or executor, shall be liable to an action for damages, notwithstanding the death of the person injured and although the death was caused under circumstances which make it murder in the first or second degree, or manslaughter. When the action is against such adminis-

trator or executor the damages recovered shall be a valid claim against the estate of such deceased person.

When death is caused by a wrongful act, neglect, or default in another state, territory, or foreign country, for which a right to maintain an action and recover damages is given by a statute of such other state, territory, or foreign country, such right of action may be enforced in this state. Every such action shall be commenced within the time prescribed for the commencement of such actions by the statute of such other state, territory, or foreign country.

The same remedy shall apply to any such cause of action now existing and to any such action commenced before January 1, 1932, or attempted to be commenced in proper time and now appearing on the files of any court within this state, and no prior law of this state shall prevent the maintenance thereof.

Ohio Revised Code. § 2125.02. *Proceedings.*

An action for wrongful death must be brought in the name of the personal representative of the deceased person, but shall be for the exclusive benefit of the surviving spouse, the children, and other next of kin of the decedent. The jury may give such damages as it thinks proportioned to the pecuniary injury resulting from such death to the persons, respectively, for whose benefit the action was brought. Except as otherwise provided by law, every such action must be commenced within two years after the death of such deceased person. Such personal representative, if he was appointed in this state, with the consent of the court making such appointment may, at any time before or after the commencement of the suit, settle with the defendant the amount to be paid.

Ohio Revised Code. § 2305.21. *Survival of Actions.*

In addition to the causes of action which survive at common law, causes of action for mesne profits, or injuries to the person or property, or for deceit or fraud, also shall survive; and such actions may be brought notwithstanding the death of the person entitled or liable thereto.

APPENDIX B.

PLEADINGS AND MOTIONS.

Amended Complaint.

FIRST CAUSE OF ACTION.

I.

Plaintiff, an individual residing in Charlevoix, Michigan, and a citizen of the State of Michigan, brings this action in her representative capacity as the qualified and acting administratrix of the Estate of Daniel Edward Gillespie, deceased, who died on the 25th day of August, 1961, at a time when he was 38 years of age. She is the surviving mother of the deceased and, along with Louis Eugene Gillespie, a brother of the deceased, and Rosanna G. Harvey, Mary Jane Gillespie and Roberta G. Keiser, all sisters of the deceased, constitute the sole and only legal heirs and beneficiaries of the deceased. As administratrix, she brings this action for the benefit of said legal heirs and next of kin, all or part of whom were dependent upon decedent for financial support, pursuant to Section 33 of the Merchant Marine Act of 1920, 41 Stat. 1007; 46 U. S. C. A. Section 688, the General Maritime Law, the Ohio Wrongful Death Act, Ohio Revised Code, Sec. 2125.01 et seq., and the Ohio Survival Statute, Ohio Revised Code Sec. 2305.21 et seq.

II.

During all times herein mentioned, the defendant United States Steel Corporation was the owner of the Steamship "Governor Miller," and used it in the transportation of freight in interstate and foreign commerce. During all times herein mentioned, the defendant, through its Pittsburgh Steamship Division, maintained and operated the Steamship "Governor Miller"; at all times herein mentioned, this defendant, through its National Tube Division, conducted business in and near Lorain, Ohio, and owned, operated and maintained a docking facility on the Black River known as National Tube Dock, Lorain, Ohio; said defendent is incorporated in the State of New Jersey; has its principal place of business in the State of Ohio, and is a resident of the State of Ohio by virtue of its business activities in the City of Cleveland, Ohio.

III.

On or about August 25, 1961, at or near 3:30 P. M., plaintiff's decedent was employed by defendant by and through its Pittsburgh Steamship Division as a seaman on the Steamship "Governor Miller," under articles, for wages and found, while the Steamship was moored to the National Tube Dock in Lorain, Ohio, upon the waters of the Great Lakes.

IV.

Plaintiff's decedent had just returned to the ship from liberty and was standing on the concrete dock to which the ship was moored. There was a deposit of wet ore on the concrete dock; it was dark and raining heavily and a high wind blew in gusts. Plaintiff's decedent assisted another seaman in the employ of this defendant in shifting a moor-

ing cable to assist in the unloading process and then waited to board the vessel after it completed the operation of shifting berth. Before it had completed its shifting operation, a ladder was lowered from the vessel toward the dock for boarding purposes. As plaintiff's decedent reached for the ladder to board the vessel, his feet slipped on the wet ore and wet surface of the dock, he lost his balance, fell into the Black River at the National Tube Dock and drowned. As a proximate result of the negligence of the defendant as described in detail below, decedent lost his life by drowning.

At the time and place herein described, defendant performed or failed to perform the following acts:

(a) It constructed and maintained a docking facility which was slippery when wet.

(b) It constructed and maintained a docking facility which was of such a curved conformation as to prevent vessels from approaching sufficiently close to the dock to use gangplanks of ordinary length for access to the ship from the dock.

(c) It failed to provide adequate barricades along its docking facilities to prevent persons, and this decedent in particular, from falling over the edge into the water.

(d) It permitted loose ore to accumulate along the edge of the docking facilities, when it knew or should reasonably have known that such ore is a dangerous and slippery substance, particularly when wet.

(e) It failed to remove accumulated dirt on the portions of the docking facility so that plaintiff's decedent was required to make his way along the slippery edge of the dock.

(f) It failed to provide plaintiff's decedent with a safe place to work and with safe appliances and equipment with which to work.

(g) It failed to properly illuminate the docking facilities.

(h) It failed to provide plaintiff's decedent with a safe means of access to its ship.

(i) It shifted its vessel in such a manner as to prevent the use of a gangplank as a means of access to its ship from the dock.

(j) It lowered a ladder from its vessel at a time when the ship was not sufficiently secured to the dock to permit safe boarding.

(k) It failed to provide a ladder for boarding the vessel which had guard rails of sufficient length to provide safe access to the ship.

(l) It provided a ladder as a means of access to its vessel from the dock which was defective, unstable, slippery, dangerous and unsafe.

(m) It failed to provide and maintain a watchman or licensed officer to superintend and supervise the shifting operation of the vessel and the attempt of the plaintiff's decedent to board the ship under adverse weather conditions.

(n) It failed to employ a gangplank as a means of access to its vessel from the dock.

(o) It failed to warn plaintiff's decedent of the dangerous and slippery condition of the docking facilities, even though it knew or should reasonably have known that deposits of wet ore were accumulated upon the dock near the edge of the waterway.

(p) Through its agent and employees it ordered plaintiff's decedent to board the vessel in the manner and from the position which he attempted to employ, despite the fact that its agents and employees in command of the vessel and the unloading operation at the National Tube Dock knew or should reasonably have known that the dock surface was wet and slippery, it was dark and rain was falling, and wet, slip-

pery ore had accumulated along the edge of the dock surface.

(q) It failed to provide gear or equipment for the use of plaintiff's decedent to protect him from falling on the slippery and dangerous dock.

(r) It failed to equip its vessel in such a way as to eliminate the necessity of boarding ship in the manner employed by the plaintiff's decedent, from an unlit, unclean, defective and unsafe dock.

V.

The failure of the defendant to provide gear and equipment to permit safe access to its vessel from a slippery, dangerous and unsafe dock and the defendant's failure to equip the ship with devices to eliminate the necessity of boarding the vessel by the ladder and tackle arrangement used, rendered the vessel unseaworthy; such unseaworthiness proximately caused the fall of the plaintiff's decedent from the dock and his resultant death by drowning.

VI.

By reason of the above described occurrence, plaintiff's decedent suffered severe personal injuries which caused him excruciating pain and mental anguish prior to his death; plaintiff says that the fair and reasonable value of the conscious pain and suffering of the decedent prior to his death is in the sum of Fifteen Thousand Dollars ($15,000.00).

VII.

As a direct and proximate consequence of the negligence of the defendant and its breach of its warranty of seaworthiness, plaintiff's decedent, 38 years old, in good health, earning and capable of earning substantial wages

as a seaman, met his death by drowning. His wrongful death has caused substantial pecuniary damage and loss to the legal heirs and beneficiaries of the decedent upon whose behalf this action is brought, in the sum of One Hundred Fifty Thousand Dollars ($150,000.00).

VIII.

Plaintiff further alleges that as administratrix of the Estate of Daniel Edward Gillespie, she has incurred funeral and burial expenses for the decedent in the sum of One Thousand One Hundred Eleven Dollars ($1,111.00).

WHEREFORE, plaintiff prays for judgment against defendant in the aggregate sum of One Hundred Sixty-Six Thousand One Hundred Eleven Dollars ($166,111.00) and her costs.

Motion to Strike.

Now comes the defendant, United States Steel Corporation, and making of each request a separate motion and asking for a separate ruling on each request, moves the Court that an order be entered requiring the plaintiff to strike the following portions of the amended complaint for the respective reasons herein stated:

REQUEST No. 1

That portion of the paragraph marked "I" of the alleged first cause of action, which reads as follows:

> "* * * the General Maritime Law, the Ohio Wrongful Death Act, Ohio Revised Code, Sec. 2125.01 et seq., and the Ohio Survival Statute, Ohio Revised Code, Sec. 2305.21 et seq."

for the reason that said allegation refers to legal remedies which can have no application to this case and, therefore, said allegation is irrelevant, immaterial, incompetent and prejudicial to the defendant.

REQUEST No. 2

The entire paragraph marked "V" of the alleged first cause of action, which paragraph reads as follows:

> "The failure of the defendant to provide gear and equipment to permit safe access to its vessel from a slippery, dangerous and unsafe dock and the defendant's failure to equip the ship with devices to eliminate the necessity of boarding the vessel by the ladder and tackle arrangement used, rendered the vessel unseaworthy; such unseaworthiness proximately caused the fall of the plaintiff's decedent from the dock and his resultant death by drowning."

for the reason that such allegations as are contained in said paragraph marked "V" are predicated upon the doctrine of unseaworthiness, which has no legal application to this case and, therefore, said allegations are irrelevant, immaterial, incompetent and prejudicial to the defendant.

REQUEST No. 3

That portion of the paragraph marked "VII" which reads as follows:

"* * * and its breach of its warranty of seaworthiness"

and that portion which reads:

"his wrongful death"

for the reason that said allegations are based on legal remedies which can have no application to this case and, therefore, said allegations are irrelevant, immaterial, incompetent and prejudicial to the defendant.

REQUEST No. 4

That portion of the paragraph marked "I" of the alleged first cause of action which reads as follows:

"* * * and, along with Louis Eugene Gillespie, a brother of the deceased, and Rosanna G. Harvey, Mary Jane Gillespie, and Roberta G. Keiser, all sisters of the deceased, constitute the sole and only legal heirs and beneficiaries of the deceased. As administratrix, she brings this action for the benefit of said legal heirs and next of kin, all or part of whom were dependent upon decedent for financial support, * * *"

for the reason that the plaintiff is not entitled under the law to bring this action on behalf of the decedent's legal heirs and next of kin when it appears that the decedent left a parent surviving.

REQUEST No. 5

That portion of the paragraph marked "VII" of the alleged first cause of action, which reads as follows:

"* * * has caused substantial pecuniary damage and loss to the legal heirs and beneficiaries of the decedent upon whose behalf this action is brought, * * *"

for the reason that plaintiff is not entitled to bring this action on behalf of decedent's legal heirs and beneficiaries when it appears that the decedent left a parent surviving.

A brief in support of this motion is attached hereto and made a part hereof.

Petition for Writ of Mandamus, Injunction or Other Appropriate Relief, United States Court of Appeals for the Sixth Circuit, No. 15,389.

To the Honorable Judges of the United States Court of Appeals for the Sixth Circuit:

1. Your petitioner, Mabel Gillespie, is an individual residing in Charlevoix, Michigan, and a citizen of the State of Michigan. She is the mother of Daniel Edward Gillespie, deceased, and the duly qualified and acting administratrix

of his estate. She is the plaintiff in a civil action filed in the United States District Court for the Northern District of Ohio, bearing case number C 62-655, entitled "Mabel Gillespie, Administratrix of the Estate of Daniel E. Gillespie, deceased v. United States Steel Corporation."

2. Your petitioner, Mabel Gillespie, is also guardian of Mary Jane Gillespie, an incompetent. Mary Jane Gillespie is the sister of the deceased, wholly dependent upon her decedent brother for support, and a beneficiary named in the amended complaint in the above described action.

3. Your petitioners, Louis Eugene Gillespie, Roberta G. Keiser and Rosanna G. Harvey are brother and sisters of the decedent and named beneficiaries in the amended complaint in the above described action.

4. In the above described action, currently pending in the United States District Court for the Northern District of Ohio, your petitioner Mabel Gillespie, as the personal representative of the decedent, sought damages for the conscious pain and suffering and wrongful death of the decedent from the defendant, United States Steel Corporation. The wrongful death action was brought for the benefit of your petitioners and arose out of the decedent's death while in the employ of the defendant. Recovery was sought pursuant to the Jones Act, Section 33 of the Merchant Marine Act of 1920, 41 Stat. 1007, 46 U. S. C. A. Section 688, as well as under the General Maritime Law, supplemented by the Ohio Wrongful Death Act, Ohio Revised Code, Section 2125.01 et seq. and the Ohio Survival Statute, Ohio Revised Code, Section 2305.21 et seq. A copy of the amended complaint is attached hereto, designated "Exhibit A" and incorporated herein by reference.

5. Defendant responded to the amended complaint by filing a motion to strike all allegations from the complaint which referred to the General Maritime Law, the doctrine of unseaworthiness and the Ohio Statutes noted in paragraph (4) above, as well as all reference to all the named beneficiaries but Mabel Gillespie individually. A copy of the defendant's motion, incorporating its grounds, is attached hereto, designated "Exhibit B" and incorporated herein by reference.

6. Petitioner Mabel Gillespie resisted the motion to strike on the grounds that the general maritime doctrine of unseaworthiness coupled with the state wrongful death act is an alternate theory of liability to the Jones Act for a single recovery for wrongful death of a seaman against his employer and that the other named beneficiaries, the other petitioners here, were entitled to recover as beneficiaries under the state wrongful death statute, which would apply if a finding of unseaworthiness was made at the trial of this cause. A copy of her brief in opposition to the motion to strike, setting out her arguments and authorities is attached, designated "Exhibit C" and incorporated herein by reference.

7. On January 30, 1963, the Honorable Paul Jones of the United States District Court for the Northern District of Ohio granted the defendant's motion to strike in its entirety, thereby eliminating from the case of your petitioner, Mabel Gillespie, individually, the alternate theory of recovery for unseaworthiness and denying entirely the right of these petitioners apart from Mabel Gillespie, individually, to recover for the wrongful death of their brother, the decedent, at the trial of this cause. A copy of the order of the court is attached hereto, designated "Exhibit D" and incorporated herein by reference.

8. The opinion of the Honorable Paul Jones of the United States District Court for the Northern District of Ohio in support of his order which is described in detail and effect in paragraph (7) above and designated "Exhibit D," and from which petitioners seek relief, demonstrated such certitude and conviction in disposing of the substantive issues raised as to preclude the success of any attempt upon the part of your petitioners to obtain an appealable order by virtue of 28 U. S. C. A. § 1292(b), which requires a written statement from the district judge that he is "of the opinion that [his] order involves a controlling question of law *as to which there is substantial ground for difference of opinion.*" (emphasis supplied) A copy of the opinion, dated January 29, 1963, is attached hereto, designated "Exhibit E" and incorporated herein by reference.

9. Upon the conviction that the rights of your petitioners other than Mabel Gillespie have been finally adjudicated adversely to their interests and that the order striking their claims from the amended complaint as described above in paragraph (7) is a final appealable order as to them, on March 1, 1963 your petitioner Mabel Gillespie perfected her appeal to this court by filing notice of appeal in the United States District Court in accordance with the provisions of Rule 73 of the Federal Rules of Civil Procedure.

10. Your petitioners represent to this court that to require them to proceed to trial only upon the claim of your petitioner Mabel Gillespie under the Jones Act alone in advance of their appeal of the order from which they seek relief, thereby eliminating the doctrine of unseaworthiness as an alternative theory of recovery for your petitioner Mabel Gillespie and foreclosing entirely the named beneficiaries apart from Mabel Gillespie, individually, from having their claims litigated in the same jury

proceeding, is unduly oppressive, unjust, expensive and will delay unnecessarily the ultimate determination of this cause.

11. Should the appeal referred to in paragraph (9) above be denied as a non-appealable order, then and in such event, your petitioners urge that they have exhausted, without success, every remedy available to them. To resolve the substantive issues in this case in advance of trial so that a speedy, just and orderly disposition of this cause may be made, your petitioners now ask this court for appropriate extraordinary relief so that their case may proceed to jury trial in a manner which will permit a full and complete determination of the rights of all of your petitioners at one time.

WHEREFORE, petitioners pray that a writ of mandamus, injunction, or other appropriate writ issue out of this Court directed to the Honorable Paul Jones, Judge of the District Court of the United States for the Northern District of Ohio, commanding him, as such judicial officer,

1. to vacate the order entered by him on January 30, 1963, more fully described in paragraph (7) above, and, in addition,

2. to make an order either

(a) denying the motion to strike in all its branches, or, in the alternative,

(b) granting the said motion, incorporating therein the requisite written statement to effectively render his said order appealable within the provisions of 28 U. S. C. A. § 1292(b)

so that the substantive issues affected by the order may be litigated through the appropriate appellate channels in advance of trial in the federal district court, and to do and perform such other acts and things as may be necessary and proper in the premises.

APPENDIX C.

OPINIONS AND JUDGMENTS BELOW.

Memorandum on Motion to Strike of the United States District Court, For the Northern District of Ohio, Eastern Division.

(Filed January 29, 1963.)

Jones, J.:

Upon careful consideration of the motion and briefs filed pro and con in this matter it is my opinion that the motion to strike should be granted in its entirety.

While a litigant may have more than one ground or theory of recovery there can be but one satisfaction and not more than one remedy.

It adds nothing to the right of recovery or the measure of damage that several laws may have supported a seaman's suit.

A reading of the complaint as to the facts and character of the suit spells "Jones Act." The incorporation of the additional legal provisions in the complaint gives no greater right or remedy than that furnished by the Jones Act.

The Jones Act gives complete coverage so far as any remedy is provided in any other legislation and indeed even more. There can be but a single recovery,—one satisfaction. The action must be brought by a legal representative; members of the family of the deceased seaman can not bring single or collective suits for individual or joint recovery.

In my opinion, the criticism of the Supreme Court's decision in Lindgren vs. United States, 281 U. S., page 38, seems a bit captious, and does not add to the orderly and complete legal recovery for wrongful death and other faults resulting in injury and damage to seamen.

An order may be entered carrying this decision into effect.

Order of the United States District Court, Northern District of Ohio, Eastern Division.

(Filed January 30, 1963.)

Upon consideration,

IT IS ORDERED that defendant's motion to strike is granted.

Order of the United States Court of Appeals for the Sixth Circuit, Nos. 15,383 and 15,389.

(Filed July 29, 1963.)

The motion for consolidation of the petition for writ of mandamus, injunction, or other appropriate relief, and of the appeal from the order of the District Court, is hereby granted, and the said petition and appeal are hereby consolidated in this court.

Approved for entry.

Order Denying Motion to Dismiss, United States Court of Appeals for the Sixth Circuit, No. 15,383.

(Filed July 29, 1963.)

It is ORDERED that the motion to dismiss the appeal be and is hereby denied.

Approved for entry.

Order of the United States Court of Appeals for the Sixth Circuit, Affirming the District Court, No. 15,383.

(Filed July 29, 1963.)

It is hereby ORDERED, ADJUDGED AND DECREED that the Order of the District Court, striking from appellant's complaint the allegations relating to the general maritime law doctrine of unseaworthiness, and the allegations relating to the Ohio Wrongful Death Act, be affirmed.

Approved for entry.

Order of the United States Court of Appeals for the Sixth Circuit, Granting Leave to File Petition, No. 15,389.

(Filed July 29, 1963.)

The motion for leave to file the petition for a writ of mandamus, injunction, or other appropriate relief, is hereby granted.

Approved for entry.

Order of the United States Court of Appeals for the Sixth Circuit, Denying Petition, No. 15,389.

(Filed July 29, 1963.)

It is ordered that the petition for writ of mandamus, injunction, or other extraordinary relief be and it is denied.

Approved for entry.

Nos. 15383, 15389

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

No. 15,383

MABEL GILLESPIE, Administratrix of the Estate of Daniel E. Gillespie, Deceased,
Plaintiff-Appellant,

v.

UNITED STATES STEEL CORPORATION, a corporation,
Defendant-Appellee.

MOTION TO DISMISS APPEAL.

No. 15,389

MABEL GILLESPIE, Administratrix of the Estate of Daniel E. Gillespie, Deceased, and Guardian of Mary Jane Gillespie, an incompetent, and LOUIS EUGENE GILLESPIE, ROBERTA G. KEISER, AND ROSANNA G. HARVEY,
Petitioners,

v.

HONORABLE PAUL JONES, Judge of the United States District Court for the Northern District of Ohio,
Respondent.

PETITION FOR A WRIT OF MANDAMUS, INJUNCTION OR OTHER APPROPRIATE RELIEF.

Decided July 29, 1963.

Before WEICK and O'SULLIVAN, Circuit Judges and MCALLISTER, Senior Circuit Judge.

MCALLISTER, Senior Circuit Judge. Appellant, Mabel Gillespie, Administratrix of the Estate of Daniel E. Gilles-

pie, Deceased, filed her complaint against the United States Steel Corporation, as defendant, in the District Court, for the recovery of damages arising out of the death of her decedent, who was a seaman and a member of the crew of one of appellee's steamers, engaged in transportation, as a cargo carrier, on the Great Lakes. The complaint alleged a cause of action based upon three separate grounds: (1) Title 46 U.S.C.A., Section 688 (the Jones Act); (2) the general maritime law (unseaworthiness); and (3) the Ohio Wrongful Death Act.

Appellee filed a motion requesting the District Court to strike from the complaint the allegations relating to the general maritime law doctrine of unseaworthiness, and the allegations relating to the Ohio Wrongful Death Act, for the reason that the appellant's right to recover for the death of her decedent was based exclusively on the Jones Act. Briefs were filed in support of the motion and in opposition thereto. The District Court entered an order granting appellee's motion to strike. From this order, appellant prosecuted an appeal. Appellee filed a motion in this court for an order dismissing the appeal on the ground that the order of the District Court is not a final appealable order and, therefore, that the appeal was premature.

Before the motion to dismiss the appeal was heard by this court, appellant, Mabel Gillespie, filed a petition in this court for extraordinary relief, including a petition for a writ of mandamus, injunction, or other appropriate writ to be issued to the District Court commanding it to vacate the order striking from the complaint the allegations relating to the general maritime law doctrine of unseaworthiness, and the allegations relating to the Ohio Wrongful Death Act; and further commanding the District Court either to enter an order denying the motion to strike, or, in the alternative, granting the motion, and incorporating therein the requisite written statement to render appealable the said order within the provisions of Title 28 U.S.C.A., Section 1292(b). This petition for extraordinary relief was filed not only by Mabel Gillespie as administratrix, but as guardian of Mary Jane Gillespie, an incompetent; and she was joined in the petition by Louis Eugene Gillespie, Roberta G. Keiser, and Rosanna G. Harvey. Mabel Gillespie is the mother of decedent, and the other named petitioners are his brothers and sisters.

The party who initiated the suit, that is, plaintiff-appellant, and the parties who initiated the petition for extra-

ordinary remedy, that is, plaintiff-appellant and petitioners, seeking relief from a single order of the District Court, submit that they will be content if this court reaches the merits of the controversy, by either means, and strongly urge such a decision at this time. For this purpose, they moved to consolidate these appellate matters; and an order granting such motion for consolidation has been granted.[1]

The order of the District Court striking the allegations relating to unseaworthiness under the general maritime law and the Ohio Wrongful Death Act, if interlocutory, is not an appealable order. Title 28 U.S.C.A., Section 1292 confers jurisdiction upon this court to hear appeals in certain instances where interlocutory orders or decrees are involved; but the order of the District Court in this case, which, it is to be said, is not an order in a proceeding in admiralty, does not come within any of the statutory classifications in which this court has jurisdiction of an appeal in an interlocutory decision.[2]

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[1] In their brief, the so-called initiating parties state:

"The unnecessary expense in time and money, the duplication of effort, the frustration of being required to await the verdict in a trial in which one is not a participant and the piecemeal litigation compelled in the trial court, all as a result of appellate inaction now, are self-evident. Add to this the procedural morass involved in the refusal of the lower court to permit alternate claims under the general maritime law as a basis for liability in the wrongful death and conscious pain and suffering counts for those who yet remain in the suit. Consider also the practical possibility that once it has been determined that the questioned beneficiaries are either in or out of this lawsuit it will be easier for counsel on both sides to evaluate the cases for settlement purposes and the necessity for any trial at all may be eliminated. It is readily apparent that appellate intervention at this stage is vital to the parties and will involve less stress upon the judicial machinery than appellate inertia at this stage of the proceedings.

"If this court should consider the controversy on its merits and determine that the order of the court below was erroneous in any respect, that court may be ordered to conform its order to the appellate ruling, the problems listed above will be eliminated, and the matter may proceed to trial in orderly fashion.

"On the other hand, should this court determine that, on the merits, the order of the court below should be affirmed, a multiplicity of suits involving the same subject matter will have been avoided and the suit in the district court may proceed, this highly important issue having been completely resolved in advance of trial."

[2] Title 28 U.S.C.A., Section 1292 provides:

"Interlocutory decisions

(a) The courts of appeals shall have jurisdiction of appeals from:

(1) Interlocutory orders of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, or of the judges thereof, granting, continuing, modifying, refusing or dissolving injunctions, or re-

It is true that according to the statute, as appears in the margin, where a district judge enters an interlocutory order in a civil action, otherwise not appealable, and is of opinion that such order involves a controlling principle of law, as to which there is substantial ground for difference of opinion, and that an immediate appeal may materially advance the ultimate termination of the litigation, he shall so state in writing in such order, and the Court of Appeals may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after entry of the order. In the instant case, however, the District Court made no such order as above provided, and this Court did not permit such appeal.

It appears that, on its face, the order of the District Court, striking the allegations from the complaint, is not a final order, but an interlocutory order, and not appealable; and the cases cited by appellee sustain the foregoing proposition. *Lewis* v. *E. I. Du Pont de Nemours & Company, Inc.*, 183 F. 2d 29 (C.A. 5); *Cox* v. *Graves, Knight & Graves, Inc.*, 55 F. 2d 217 (C.C.A. 4). An order striking a portion of the pleadings is not a final order. *Markham* v. *Kasper, et al.*, 152 F. 2d 270 (C.A. 7); *Libbey-Owens-Ford Glass Co.* v. *Sylvania Indust. Corp.*, 154 F. 2d 814 (C.A. 2); *Stewart* v. *Shanahan*, 277 F. 2d 233 (C.A. 8).

However, counsel for appellant persuasively argues that the order of the District Court is not an interlocutory order, but a final order, because of these reasons: the order,

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fusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court;

(2) Interlocutory orders appointing receivers, or refusing orders to wind up receiverships or to take steps to accomplish the purposes thereof, such as directing sales or other disposals of property;

(3) Interlocutory decrees of such district courts or the judges thereof determining the rights and liabilities of the parties to admiralty cases in which appeals from final decrees are allowed;

(4) Judgments in civil actions for patent infringement which are final except for accounting.

(b) When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: *Provided, however*, That application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order."

striking the allegations in question, entirely eliminated decedent's dependent brothers and sisters as beneficiaries in the wrongful death action based upon unseaworthiness; it removed from the wrongful death count of decedent's mother, the alternate theory of unseaworthiness; and it further removed any right to recover damages for conscious pain and suffering of decedent on the alternate theory of liability for unseaworthiness.

The difficulties of determining what a "final" appealable order is, are ably discussed by counsel for appellant in his brief, which embraces the argument that, even in cases where interim orders are called final, they may be really interlocutory, but have been held appealable solely because of hardship; that where an interim order adversely affects substantial rights which cannot be adequately protected by a subsequent appeal, the hardship rule will be invoked to make such an order final and appealable; and that the provision for appeal only from final decisions should not be so constructed as to deny effective review of a claim fairly severable from the context of a larger litigious process. *Dickinson* v. *Petroleum Conversion Corp.*, 338 U.S. 507, 511; *Pabellon* v. *Grace Line*, 191 F. 2d 169, 179 (C.A. 2); *Holdsworth* v. *United States*, 179 F. 2d 933 (C.A. 1); *Forgay* v. *Conrad*, 6 How. 201; *Craighead* v. *Wilson*, 18 How. 199; *U.S. Alkali Export Assn.* v. *United States*, 325 U.S. 196; *Cohen* v. *Beneficial Ind. Loan Corp.*, 337 U.S. 541; *Swift & Co. Packers* v. *Compania Colombiana Del Caribe*, 339 U.S. 684.

The question whether the order of the District Court is an appealable or non-appealable order is a close one. We would, at this time, in the interest of the due and proper administration of justice, prefer to decide the appeal on the merits, if that be possible; and we think it is. Plaintiff-appellant and petitioners ask for a disposition on the merits at this time, and agree to submit the controversy for such a determination; and, while in the regular course, the record, printed indices, and briefs would be filed, and the case placed upon the calendar for argument, we shall proceed to a determination on the merits, since our decision will not prejudice the rights of appellee defendant and respondent, who have not entered a consent to such a disposition.

We are, accordingly, of the view that, in the light of the motion, petition, and arguments advanced in the briefs,

it is proper here to consider and pass upon the contention made by plaintiff-appellant and petitioners that the District Court erred in its order striking from the complaint the allegations basing the cause of action upon the general maritime law of unseaworthiness, and also striking the allegations basing the cause of action on the provisions of the Ohio Wrongful Death Act, leaving the plaintiff only the right to proceed under the Jones Act.

We proceed then to discuss the rights to which plaintiff-appellant and appellees are entitled under the Jones Act; whether they have any remedies under the general maritime law, and the Ohio Wrongful Death Act; whether the hardship rule applies as to interlocutory orders; and whether the motion to dismiss the appeal should be granted or denied.

We start first with the Jones Act. Prior to the Jones Act, 46 U.S.C.A., Section 688, there was no liability for wrongful death under the general maritime law. That law gave no right to recover indemnity for the death of a seaman, although occasioned by the unseaworthiness of the vessel, by negligence, and conferred no right whatever upon his personal representatives to recover damages. *Lindgren* v. *United States*, 281 U.S. 38.

The Jones Act gave a right of action to the personal representatives to recover damages, for and on behalf of designated beneficiaries, for the death of a seaman when caused by negligence. It provides:

> "Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located."

The effect of the Jones Act was to incorporate into the maritime law the statute applying to injuries to, and death of railway employees engaged in interstate commerce, known as the Federal Employers' Liability Act, Title 45 U.S.C.A., Section 51, which provides:

> "Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment."

Before proceeding to the other issues in the case, we shall dispose of the claim made for damages resulting from injuries to decedent causing conscious pain, suffering, and mental anguish prior to his death. The complaint alleges: "As plaintiff's decedent reached for the ladder to board the vessel, his feet slipped on the wet ore and wet surface of the dock, he lost his balance, fell into the Black River at the National Tube Dock and drowned"; that "[by] reason of the above described occurrence, plaintiff's decedent suffered personal injuries which caused him excruciating pain and mental anguish prior to his death. . . ." Assuming, at this point, that a right of action were to pass to decedent's relatives under the Ohio Wrongful Death Act, it would seem that there would be no substantial basis, in this case, for a separate estimate of pain and suffering.[3]

[3] In *The Corsair*, 145 U.S. 335, 348, the court said:

"We do not find it necessary to express an opinion whether a libel *in rem* will lie for injuries suffered by the deceased before her death,

Prior to the Jones Act, the general maritime law afforded no remedy by way of indemnity beyond maintenance and cure for the injury to a seaman caused by the mere negligence of a ship's officer or a member of the crew. Nevertheless, the admiralty rule that the vessel and owner were liable to indemnify a seaman for injury caused by the unseaworthiness of the vessel or its appurtenant appliances had been the settled rule long before the enactment of the Jones Act. *Mahnich* v. *Southern S.S. Co.*, 321 U.S. 96; *The Osceola*, 189 U.S. 158, 175. By the Jones Act, therefore, Congress created a new cause of action, not then known to maritime law, for bodily injuries to a seaman, or for his death, caused by the negligence of any of the officers, agents, or employees of the ship. Thus, an injured seaman may bring an action claiming damages under the Jones Act for negligence, and, under the general maritime law, for unseawothiness. *McAllister* v. *Magnolia Petroleum Co.*, 357 U.S. 221. This, obviously, comes about because, prior to the Jones Act an injured seaman had a federal right in admiralty for an injury caused by unseaworthiness; and to this was added the new cause of action for negligence under the Jones Act.

Appellant, in the District Court, contended that she had the right to maintain an action for damages for the wrongful death of her decedent, a seaman, by reason of the unseaworthiness of the ship, under the general maritime law, as well as for negligence under the Jones Act. In reply, appellee submitted that the right of recovery for wrongful death given by the Jones Act is exclusive and precludes a

a right of action for which passes to the immediate relatives, under the Louisiana statute, since there is no proper averment in the libel to show that such damages were suffered. It is true that the seventh paragraph alleges that from the time the 'tug struck the bank of the river to the time she sunk,' (about ten minutes,) 'and the said Ella Barton was drowned, she, said Ella Barton, suffered great mental and physical pains and shock, and endured the tortures and agonies of death.' But there is no averment from which we can gather that these pains and sufferings were not substantially cotemporaneous with her death and inseparable as matter of law from it. *Kearney* v. *Boston & Worcester Railroad*, 9 Cush. 108; *Hollenbeck* v. *Berkshire Railroad Co.*, 9 Cush. 478; *Kennedy* v. *Standard Sugar Refinery*, 125 Mass. 90; *Moran* v. *Hollings*, 125 Mass. 93. Had she suffered bodily wounds and bruises, from the result of which she lingered and ultimately died, it is possible that her sufferings during her illness would give a separate cause of action; but the very fact that she died by drowning indicates that her sufferings must have been brief, and, in law a mere incident to her death. Her fright for a few minutes is too unsubstantial a basis for a separate estimation of damages."

right of recovery of indemnity for the death of a seaman by reason of the unseaworthiness of the vessel.

In considering these contentions, we refer to the origin and development of the remedy for unseaworthiness. It is a doctrine judicially, rather than legislatively, created; and in *The State of Maryland*, 85 F. 2d 944, 945 (C.A. 4), Judge John J. Parker summarized the history of the remedy.[4]

In *Mitchell* v. *Trawler Racer, Inc.*, 362 U.S. 538, 544, Mr. Justice Stewart defined the doctrine of unseaworthiness, bringing it down to its latest development, in a notable opinion, in which, speaking for the court, he said: "The earliest mention of unseaworthiness in American judicial opinions appears in cases in which mariners were suing for their wages. They were required to prove the unseaworthiness of the vessel to excuse their desertion or misconduct which otherwise would result in a forfeiture of their right to wages. See *Dixon* v. *The Cyrus*, 7 Fed. Cas.

[4] In the cited case, Judge Parker said:

"Seamen are the wards of admiralty, and the policy of the maritime law has ever been to see that they are accorded proper protection by the vessels on which they serve. In early days, this protection was sufficiently accorded by the enforcement of the right of 'maintenance and cure.' Vessels and their appliances were of comparatively simple construction, and seamen were in quite as good position ordinarily to judge of the seaworthiness of a vessel as were her owners . . .

"With the advent of steam navigation, however, it was realized, at least in this country, that 'maintenance and cure' did not afford to injured seamen adequate compensation in all cases for injuries sustained. Vessels were no longer the simple sailing ships, of whose seaworthiness the sailor was an adequate judge, but were full of complicated and dangerous machinery, the operation of which required the use of many and varied appliances and a high degree of technical knowledge. The seaworthiness of the vessel could be ascertained only upon an examination of this machinery and appliances by skilled experts. It was accordingly held that the duty of the vessel and her owners to the seaman, in this new age of navigation, extended beyond mere 'maintenance and cure,' which had been sufficient in the simple age of sailing ships; that the owners owed to the seamen the duty of furnishing a seaworthy vessel and safe and proper appliances in good order and condition; and that for failure to discharge such duty there was liability on the part of the vessel and her owners to a seaman suffering injury as a result thereof. *The Osceola*, 189 U.S. 158, 175. . . . In the *Edith Godden* (D.C.), 23 F. 43, 46, which dealt with the case of a seaman injured by a defective derrick, Judge Addison Brown pointed out that in dealing with injuries sustained by the use of modern appliances 'it is more reasonable and equitable to apply the analogies of the municipal law in regard to the obligation of owners and masters, rather than to extend the limited rule of responsibility under the ancient maritime law to these new, modern conditions, for which those limitations were never designed.'"

755, No. 3,930; *Rice* v. *The Polly & Kitty*, 20 Fed. Cas. 666, No. 11,754; *The Moslem*, 17 Fed. Cas. 894, No. 9,875. The other route through which the concept of unseaworthiness found its way into the maritime law was via the rules covering marine insurance and the carriage of goods by sea. *The Caledonia*, 157 U.S. 124; *The Silvia*, 171 U.S. 462; *The Southwark*, 191 U.S. 1; I Parsons on Marine Insurance (1868) 367-400.

"Not until the late nineteenth century did there develop in American admiralty courts the doctrine that seamen had a right to recover for personal injuries beyond maintenance and cure. During that period it became generally accepted that a shipowner was liable to a mariner injured in the service of a ship as a consequence of the owner's failure to exercise due diligence.

"This was the historical background behind Mr. Justice Brown's much quoted second proposition in *The Osceola*, 189 U.S. 158, 175: 'That the vessel and her owner are, both by English and American law, liable to an indemnity for injuries received by seamen in consequence of the unseaworthiness of the ship, or a failure to supply and keep in order the proper appliances appurtenant to the ship.' In support of this proposition the Court's opinion noted that '[i]t will be observed in these cases that a departure has been made from the Continental codes in allowing an indemnity beyond the expense of maintenance and cure in cases arising from unseaworthiness. This departure originated in England in the Merchants' Shipping Act of 1876 . . . and in this country, in a general consensus of opinion among the Circuit and District Courts, that an exception should be made from the general principle before obtaining, in favor of seamen suffering injury through the unseaworthiness of the vessel. We are not disposed to disturb so wholesome a doctrine by any contrary decision of our own.' 189 U.S., at 175. . . .

"In 1944 this Court decided *Mahnich* v. *Southern S.S. Co.*, 321 U.S. 96. While it is possible to take a narrow view of the precise holding in that case, the fact is that *Mahnich* stands as a landmark in the development of admiralty law. Chief Justice Stone's opinion in that case gave an unqualified stamp of solid authority to the view that *The Osceola* was correctly to be understood as holding that the duty to provide a seaworthy ship depends not at all upon the negligence of the shipowner or his agents. Moreover, the dissent in *Mahnich* accepted this reading of *The Osceola* and claimed no more than that the injury in

Mahnich was not properly attributable to unseaworthiness. See 321 U.S., at 105-113.

"In *Seas Shipping Co.* v. *Sieracki*, 328 U.S. 85, the Court effectively scotched any doubts that might have lingered after *Mahnich* as to the nature of the shipowner's duty to provide a seaworthy vessel. The character of the duty, said the Court, is 'absolute.' 'It is essentially a species of liability without fault, analogous to other well known instances in our law. Derived from and shaped to meet the hazards which performing the service imposes, the liability is neither limited by conceptions of negligence nor contractual in character. . . . It is a form of absolute duty owing to all within the range of its humanitarian policy.' 328 U.S., at 94-95. The dissenting opinion agreed as to the nature of the shipowner's duty. '[D]ue diligence of the owner,' it said, 'does not relieve him from this obligation.' 328 U.S., at 104.

"From that day to this, the decisions of this Court have undeviatingly reflected an understanding that the owner's duty to furnish a seaworthy ship is absolute and completely independent of his duty under the Jones Act to exercise reasonable care. . . .

"There is ample room for argument, in the light of history, as to how the law of unseaworthiness should have or could have developed. Such theories might be made to fill a volume of logic. But, in view of the decisions in this Court over the last 15 years, we can find no room for argument as to what the law is. What has evolved is a complete divorcement of unseaworthiness liability from concepts of negligence. To hold otherwise now would be to erase more than just a page of history."

However, all of the foregoing is concerned with damages growing out of a claim of unseaworthiness resulting in *injuries* to a seaman, rather than indemnity for his *death* resulting from unseaworthiness, or, —in the case of *The Tungus*—for the death of a person who was not a seaman, and therefore, not under the Jones Act; and the foregoing adjudications are here referred to because of the contention in the District Court that the rule relating to the unseaworthiness of a vessel, resulting in injuries to a seaman, should also apply in case of his death resulting from such unseaworthiness.

While, prior to the Jones Act, a vessel and owner were liable to indemnify a seaman for injuries caused by unseaworthiness, nevertheless, before the passage of that Act,

the vessel and owner were not, under federal or maritime law, liable for the *death* of a seaman occasioned by unseaworthiness and negligence. *Lindgren* v. *United States*, 281 U.S. 38. Long before the *Lindgren case*, in *The Harrisburg*, 119 U.S. 199, it was held that, in the absence of an act of Congress or a statute of a State giving a right of action therefor, a suit in admiralty cannot be maintained in the courts of the United States to recover damages for the death of a human being on the high seas, or on waters navigable from the sea, which is caused by negligence.

This seems a somewhat harsh rule for the Admiralty to apply to its wards, of which it is customarily said it has such tender and protective feeling; and Mr. Justice Brennan in his opinion, partly dissenting and partly concurring, in *The Tungus* v. *Skovgaard*, 358 U.S. 588, 599, commented upon the holding of *The Harrisburg*, supra, saying that it was based largely on an application of the harsh common-law principle, and that, in the absence of an appropriate statute, there was no civil remedy for wrongful death. Nevertheless, he declared that "*the holding has become part and parcel of our maritime jurisprudence.*[5] But its harshness was averted by the practice in admiralty of drawing on the state wrongful death statutes to furnish remedies for federal maritime torts." (Emphasis supplied) In *The*

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[5] Prior to *The Tungus* v. *Skovgaard*, supra, Mr. Justice Brennan had occasion to outline the basis of liability for unseaworthiness in *Kernan* v. *American Dredging Co.*, 355 U.S. 426, 428, involving the Jones Act, in which he stated:

"[The] remedy for unseaworthiness derives from the general maritime law, and that law recognizes no cause of action for wrongful death whether occasioned by unseaworthiness or by negligence. *The Harrisburg*, 119 U.S. 199; see *Western Fuel Co.* v. *Garcia*, 257 U.S. 233, 240. Before the Jones Act, federal courts of admiralty resorted to the various state death acts to give a remedy for wrongful death. *The Hamilton*, 207 U.S. 398; *The Transfer No. 4*, 61 F. 364; see *Western Fuel Co.* v. *Garcia*, supra, at 242; *Great Lakes Dredge & Dock Co.* v. *Kierejewski*, 261 U.S. 479. The Jones Act created a federal right of action for the wrongful death of a seaman based on the statutory action under the Federal Employers' Liability Act. In *Lindgren* v. *United States*, 281 U.S. 38, the Court held that the Jones Act remedy for wrongful death was exclusive and precluded any remedy for wrongful death within territorial waters, based on unseaworthiness, whether derived from federal or state law. The petitioner assumes that under today's general maritime law the personal representative of a deceased seaman may elect, as the seaman himself may elect, between an action based on the FELA and an action, recognized in *The Osceola*, 189 U.S. 158, 175, based upon unseaworthiness. In view of the disposition we are making of this case, we need not consider the soundness of this assumption. . . .

"In denying the claim the lower courts relied upon their views of general tort doctrine. It is true that at common law the liability of

Tungus case, supra, the decedent was not a seaman, but an employee of an oil company, working on the ship; and his death did not occur on the high seas, thereby excluding the Death on the High Seas Act, if that statute had otherwise been applicable. It was held in *The Tungus case* that a claim for unseaworthiness was encompassed by the New Jersey Wrongful Death Act, which could be applied by a court in admiralty; and it was pointed out by Mr. Justice Stewart, speaking for the court: "Although Congress has enacted legislation, notably the Jones Act and the Death on the High Seas Act, providing for wrongful death actions in a limited number of situations, *no federal statute is applicable to the present case.*" (Emphasis supplied) The court accordingly applied the New Jersey Wrongful death statute and concluded that a claim for unseaworthiness, because of the negligent failure on the part of the ship and owner to provide plaintiff's decedent with a reasonably safe place to work, was encompassed by the New Jersey Wrongful Death Act, which gave a right of action for "death by wrongful act." Mr. Justice Stewart, however, during the course of his opinion in *The Tungus case*, stated: "We begin as did the Court of Appeals with the established principle of maritime law that in the absence of a statute there is no action for wrongful death. *The Harrisburg*, 119 U.S. 199." (p. 590)

What the Jones Act established was a modification of the prior maritime law, and a new rule of general application in reference to the liability of owners of vessels for

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the master to his servant was founded wholly on tort rules of general applicability and the master was granted the effective defenses of assumption of risk and contributory negligence. This limited liability derived from a public policy, designed to give maximum freedom to infant industrial enterprises, 'to insulate the employer as much as possible from bearing the 'human overhead' which is an inevitable part of the cost—to someone—of the doing of industrialized business.' *Tiller* v. *Atlantic Coast Line R. Co.*, 318 U.S. 54, 59. But it came to be recognized that, whatever the rights and duties among persons generally, the industrial employer had a special responsibility toward his workers, who were daily exposed to the risks of the business and who were largely helpless to provide adequately for their own safety. Therefore, as industry and commerce became sufficiently strong to bear the burden, the law, the reflection of an evolving public policy, came to favor compensation of employees and their dependents for the losses occasioned by the inevitable deaths and injuries of industrial employment, thus shifting to industry the 'human overhead' of doing business. For most industries this change has been embodied in Workmen's Compensation Acts. In the railroad and shipping industries, however, the FELA and Jones Act provide the framework for determining liability for industrial accidents."

injuries to seamen; it superseded all state legislation on that subject; and the right of action given by the Jones Act to the personal representative to recover damages *for and on behalf of designated beneficiaries* for the death of a seaman when caused by negligence, is exclusive, and precludes a right of recovery of indemnity for the death by reason of the unseaworthiness of the vessel, irrespective of negligence, notwithstanding that right might be predicated upon the death statute of the State in which the injury was received. *Lindgren* v. *United States*, 281 U.S. 38.

While any seaman who shall suffer personal injury in the course of his employ may, at his election, maintain actions under the maritime law to recover for personal injuries occasioned by the unseaworthiness of the vessel, and under the Jones Act, for injuries caused by negligence, nevertheless, the personal representative of a deceased seaman had no right of action under the prior maritime law; and therefore, the right of action given a personal representative, under the Jones Act, to recover damages for the seaman's death when caused by negligence, for and on behalf of designated beneficiaries, is necessarily exclusive and precludes the right of recovery of indemnity for his death by reason of the unseaworthiness of the vessel.[6] It is clear that, so long as Congress had not exercised the power given it under the commerce clause of the Constitution with respect to the liability in such cases, the states might occupy the field; but as soon as Congress acted, the legislation of the states was superseded, and that of Congress became supreme and exclusive. Congress, having exercised the power given to it under the commerce clause of the Constitution, by enacting the Jones Act, covering fully the right of the personal representative of a seaman to recover from an employer for injury resulting in death, thereby superseded all state legislation bearing upon the subject. *United States* v. *Lindgren*, 28 F. 2d 725 (C.A. 4th).[7]

[6] It is to be noted that an injured seaman cannot be required to exercise an election between his remedies for negligence under the Jones Act and for unseaworthiness. *McAllister* v. *Magnolia Petroleum Co.*, 357 U.S. 221, 222.

[7] See *The Minnesota Rate Cases*, 230 U.S. 352, 398, 399, in which Mr. Justice Hughes, speaking for the Court, said:

> "Interstate carriers, in the absence of Federal statute providing a different rule, are answerable according to the law of the State for nonfeasance or misfeasance within its limits. . . . Until the enactment by Congress of the act of April 22, 1908, c. 149, 35 Stat. 65, the laws of the States determined the liability of interstate carriers [to]

In *Turcich* v. *Liberty Corp.*, 119 Fed. Supp. 7, 11 (E.D. Pa.), in an order denying a new trial, the District Court discussed unseaworthiness occasioned by negligence as well as the absolute duty to see that the vessel was seaworthy, for the breach of which, without regard to negligence, the injured seaman might recover, since the general maritime law makes the owners liable for such losses. But the court went on to say that the doctrine of unseaworthiness as announced by the Supreme Court, related only to the seaman's own right to recover for personal injuries occasioned by the unseaworthiness of the vessel, and conferred no right whatever upon his personal representative to recover indemnity for his death; and that, until the Jones Act, there was no Federal right of action for the wrongful death of a seaman caused by negligence. The court, however, pointed out:

> "The gist or gravamen of an action under the Jones Act is negligence. In order to maintain an action under the Act, the seaman or his personal representative must allege and prove negligence, for unless the seaman or his personal representative can establish negligence of the owners of the vessel or her officers, agents or employees, no liability exists. The negligence of the owners of the vessel may consist in the failure to supply and maintain a seaworthy vessel, properly equipped and manned or the negligence of the master or members of the crew, as provided in the Act."

The survival provisions of the Jones Act apply to an action brought by the personal representative of a deceased seaman, whose death was occasioned by a shipowner's negligent failure to comply with the absolute duty to furnish a seaworthy vessel. *Fall, Admx.* v. *Esso Standard Oil Company*, 297 F. 2d 411, 417 (C.A. 5). Moreover, in

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railroad for injuries received by their employes while engaged in interstate commerce, and this was because Congress, although empowered to regulate the subject, had not acted thereon. In some States the so-called fellow-servant rule obtained; in others, it had been abrogated; and it remained for Congress, in this respect and in other matters specified in the statute, to establish a uniform rule." See also *Southern Pacific Co.* v. *Jensen*, 244 U.S. 205, 216, defining and giving instances as to how far the general maritime law may be changed or affected by state legislation. In *Kibadeaux* v. *Standard Dredging Co.*, 81 F. 2d 670, 672 (C.A. 5), Judge Sibley referred to these instances as "vexing distinctions."

Kernan, Adm'r. v. *American Dredging Company*, 355 U.S. 426, the court held that, under the Jones Act, which incorporates the provisions of the Federal Employers' Liability Act, a seaman's employer was liable, without a showing of negligence, for his death resulting from a violation of the Coast Guard regulations pertaining to navigation. In arriving at this conclusion, the court referred to the fact that its decisions under the Federal Employers' Liability Act, based upon violations of the Safety Appliance Act or the Boiler Inspection Act, established that a violation of either Act created liability without regard to negligence, if the violation, in fact, contributed to the death or injury, irrespective of whether the injury flowing from the breach was the injury which the statute sought to prevent; and that the Jones Act expressly provided for seamen the cause of action—and consequently the entire judicially developed doctrine of liability—granted to railroad workers under the Federal Employers' Liability Act.

Plaintiff-appellant submits that the statement of the court in *Lindgren* v. *United States*, 281 U.S. 38, that the personal representative of a deceased seaman could not, under the general maritime law, recover indemnity for the death of a seaman, was only dicta; and appellant refers to the remark of Mr. Justice Brennan in *The Tungus* v. *Skovgaard*, 358 U.S. 588, 606, in his opinion, concurring in part, and dissenting in part, in which he says that the opinion in *Lindgren* v. *United States*, supra, "dealt primarily with the effect of the Jones Act's wrongful death provision in removing the seaman's right to invoke the remedies of state Death Acts for the identical gravamen of negligence. And, although the libel did not allege unseaworthiness, the Court briefly observed that the Jones Act's death provision would be construed equally as foreclosing a state statute's use on that count." It is true that the libel in the *Lindgren case* did not allege unseaworthiness; but the matter was there before the court, since decedent left no survivors entitled to maintain an action under the Jones Act, and counsel for the administrator urged, in the language of the opinion of the court, "that the right of action given the personal representative by the Merchant Marine Act is not exclusive, and that it neither supersedes the right of action given him by the death statute of the State in which the injury was sustained, nor precludes his right to recover indemnity for the death under the old

admiralty rules on the ground that the injuries were occasioned by the unseaworthiness of the vessel." The court said, however: "These contentions cannot be sustained."

It does not appear that the language in the *Lindgren case*, referred to by counsel for appellant, was dicta, for the reason that the matter was before the court, in the *Lindgren case*; was argued before the court; and was passed upon by the court. Moreover, the Supreme Court in *The Tungus case*, supra, declared that it was an established principle of maritime law that, "in the absence of a statute there was no action for wrongful death" (p. 590); and in *Kernan* v. *American Dredging Company*, 355 U.S. 426, the court said that the remedy for unseaworthiness derives from the general maritime law, and that law recognizes no cause of action for wrongful death, whether occasioned by unseaworthiness or by negligence. (p. 428) The Court of Appeals for the Fifth Circuit on this point observed: "We feel compelled to hold that the general maritime law, unaided by the Jones Act, anomalously, archaically, unnecessarily in terms of general principles, gives (plaintiff) no right of action." *Fall, Adm'x.* v. *Esso Standard Oil Co.*, 297 F. 2d 411, 417.

We are of the view that the right of plaintiff-appellant rests solely on the Jones Act. As administratrix of the deceased seaman, she would have had no right of action for negligence, or under the general maritime law for unseaworthiness, resulting in his death, prior to the Jones Act. That statute gave an action for damages for death resulting from negligence,* and the damages were limited to the deceased employee's "personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next-of-kin dependent upon such employee. . . ." As Judge John J. Parker said in *United States* v. *Lindgren*, 28 F. 2d 725, 727: "The statute which was thus incorporated into the maritime law, and which conferred upon the injured seaman, or his representative, if his injury resulted in death, rights which might be enforced either in an action at law or a suit in admiralty, clearly provides that there can be a recovery in

* It is to be emphasized that the Jones Act gives an action for damages for death resulting from negligence as well as for death, without regard to negligence, where a violation of statutes or regulations contributes to the death. *Kernan* v. *American Dredging Co.*, 355 U.S. 426.

case of death only where there is a showing of dependency. . . . And, in the light of the authorities cited above, we think that the statute must be deemed exclusive and to supersede all state legislation bearing upon the subject."

Counsel for plaintiff-appellant argues that the rule in *Lindgren* v. *United States*, supra, is to be disregarded on the ground that it has become eroded, overrun by the decided cases in contiguous areas, and that the Supreme Court has already indicated that it will determine in the future that an action will lie for the wrongful death of a seaman caused by unseaworthiness, without regard to the Jones Act. To buttress this contention, counsel refers to *Kernan* v. *American Dredging Co.*, 355 U.S. 426, 429-430, where the court, speaking through Mr. Justice Brennan, said:

> "The petitioner assumes that *under today's general maritime law* the personal representative of a deceased seaman may elect, as the seaman himself may elect, between an action based on the FELA and an action, recognized in *The Osceola*, 189 U.S. 158, 175, based upon unseaworthiness. *In view of the disposition we are making of this case, we need not consider the soundness of this assumption.*" (Emphasis supplied)

It is submitted that the foregoing indicates that the court may now be considering the reversal of the rule that the personal representative of a deceased seaman is limited to damages under the Jones Act, and that he may, in the future, bring an action based upon unseaworthiness under the general maritime law. See *Schlichter* v. *Port Arthur Towing Co.*, 288 F. 2d 801, 806 (C.A. 5); see also Mr. Justice Brennan's opinion, dissenting in part and concurring in part, in *The Tungus* v. *Skovgaard*, 358 U.S. 588, 597, 611, to which reference was made in *Fitzgerald* v. *United States Lines*, . . . U.S. . . . (decided June 10, 1963). However, if the prior rule is no longer accepted by the Supreme Court, and *Lindgren* v. *United States*, supra, is to be overruled, the landmarks must be plainer to see; and it would be unbecoming for this Court to base its determination upon the assumption that the holding in *Lindgren* is to be reversed. It has been said that *The Harrisburg*, 119 U.S. 199, "was decided long before the cause of action for unseaworthiness reached its present mature state, recognized as being federal in its origin and incidents."

Justice Brennan's opinion, dissenting in part, and concurring in part in *The Tungus* v. *Skovgaard*, 358 U.S. 588, 605. In the same case, Mr. Justice Brennan also said: "Admiralty law is primarily judge-made law. The federal courts have a most extensive responsibility of fashioning rules of substantive law in maritime cases. (p. 611)"[9] But he added that the holding that, in the absence of an appropriate statute, there was no civil remedy for wrongful death, "*has become part and parcel* of our maritime jurisprudence." (Emphasis supplied.) This, it is to be remarked, was subsequent to the *Kernan case*, upon which plaintiff-appellant places such store. In *Mitchell* v. *Trawler Racer, Inc.*, 362 U.S. 539, 550, Mr. Justice Frankfurter, in the course of a dissenting opinion, remarked: "No area of federal law is judge-made at its source to such an extent as is the law of admiralty"; and in *Fitzgerald* v. *United States Lines*, supra, Mr. Justice Black said that: "Article III of the Constitution vested in the federal courts jurisdiction over admiralty and maritime cases, and since that time, the Congress has largely left to this court the responsibility for fashioning the controlling rules of admiralty law."[10] Nevertheless, when Congress has exercised its powers in the admiralty and maritime field, such as in the enactment of the Jones Act, that statute would seem controlling, whatever may be other developments of judge-made admiralty or maritime law. This conclusion would appear to follow since Congress has acted in a specific field; has provided a special remedy and no other; and has restricted recovery of damages to designated dependent bene-

[9] Such a responsibility is, perhaps, not limitless. In *Southern Pacific Co.* v. *Jensen*, 244 U.S. 205, 221, Mr. Justice Holmes observed: "I recognize without hesitation that judges do and must legislate, but they can do so only interstitially; they are confined from molar to molecular motions. A common-law judge could not say I think the doctrine of consideration a bit of historical nonsense and shall not enforce it in my court. No more could a judge exercising the limited jurisdiction of admiralty say I think well of the common-law rules of master and servant and propose to introduce them here *en bloc*."

[10] In the *Fitzgerald case* the court said that the Seventh Amendment did not require jury trials in admiralty cases, nor did that amendment nor any other provision of the Constitution forbid them; nor did any statute of Congress or Rule of Procedure, Civil or Admiralty, forbid jury trials in maritime cases. The court held that a seaman was entitled to a jury trial on a maintenance and cure claim joined with a claim for Jones Act negligence when both arose out of the same facts. The proposition is now established, but the difficulties in arriving at such a determination are evidenced in the dissenting opinion of Mr. Justice Harlan, and the three differing opinions of the Court of Appeals of the Second Circuit, whose decision was reversed.

ficiaries. Moreover, it is to be observed that in the *Kernan case*, it was held that liability for the death of the seaman depended entirely on the Jones Act; in *The Tungus case*, the decedent was not a seaman and had no rights under the Jones Act; and in the *Fitzgerald* case, the claim was, under the Jones Act, for damages resulting in injuries to a seaman. None of these cases was for indemnity for the death of a seaman, occasioned by unseaworthiness, under the general maritime law, or under a state Wrongful Death Act; and what is said in these cases can hardly be taken to mean that the heretofore settled law is to be overruled, and that a personal representative has a right of action for indemnity for the death of a seaman occasioned by an unseaworthy vessel, under the maritime law, and also under a state Wrongful Death Act, as well as under the Jones Act.

In the Jones Act, Congress gave a federal right of action to the personal representative of a seaman whose death resulted from negligence, for the benefit of specified dependents. No such right had previously existed. Congress having, by the Jones Act, pre-empted the field relating to recovery of damages for the death of a seaman, that statute must be deemed to supersede all state legislation bearing on the subject and to be the exclusive remedy in such a case.

It is to be noted that all of the allegations of the complaint upon which plaintiff bases her claim for indemnity constitute assertions of negligence. As plaintiff, in her complaint, states: "As a proximate result of the negligence of the defendant as described in detail below, decedent lost his life by drowning." Whether the negligence was failure to provide safe access to the ship for plaintiff's decedent, or whether the negligence was a breach of defendant's duty to provide a seaworthy ship, the action is based upon negligence and proximate cause, and, on the proof thereof, plaintiff would be entitled to a judgment. As personal representative of her decedent, plaintiff could maintain the suit and recover under the Jones Act. The only difference between a recovery under the Jones Act and a recovery under the maritime law for unseaworthiness, or under the Ohio Wrongful Death Act, is that, under the Jones Act, the recovery is limited to certain designated dependent beneficiaries, as provided by that statute, and under the maritime law and the Ohio Wrongful Death Act, other persons,

including dependents or non-dependents would have rights of indemnity.

In accordance with the controlling adjudications and in the light of the circumstances disclosed in this case, the exclusive remedy for indemnity for the death of plaintiff's decedent is through an action brought by the personal representative under the Jones Act. Because of such exclusive remedy, petitioners in Case No. 15,389 have no right of action under the general maritime law for unseaworthiness or under the Ohio Wrongful Death Act. Having no such rights, the hardship rule applicable to interlocutory orders, resulting in their being considered as appealable orders, would not, in any event, be relevant.

Under the foregoing circumstances, the need for the issuance of a writ of mandamus, injunction, or granting of a petition for other extraordinary remedy, under given appropriate circumstances, disappears. As heretofore said, ordinarily, we would not have reached the merits of this controversy except after a hearing of the appeal. However, because of petitioners' prayer for extraordinary relief, we have duly examined all the related questions, and also because of plaintiff's and petitioners' request and consent, we have considered and determined the controversy on the merits as though it were submitted on an appeal; and our determination is not prejudicial to appellee and respondent, who have not so consented. It is our conclusion that an order be entered in Case No. 15,389 denying the petition for a writ of mandamus, injunction, or other extraordinary relief; that an order be entered in Case No. 15,383 denying the motion to dismiss the appeal; and that the order of the District Court, striking from appellant's complaint the allegations relating to the general maritime law doctrine of unseaworthiness, and the allegations relating to the Ohio Wrongful Death Act, be affirmed.

In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 10

MABEL GILLESPIE,
Administratrix of the Estate of Daniel E. Gillespie, Deceased,
Petitioner,

v.

UNITED STATES STEEL CORPORATION,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

BRIEF FOR UNITED STATES STEEL CORPORATION IN OPPOSITION.

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In the Supreme Court of the United States

OCTOBER TERM, 1963.

No. 582.

MABEL GILLESPIE,
Administratrix of the Estate of Daniel E. Gillespie, Deceased,
Petitioner,

v.

UNITED STATES STEEL CORPORATION,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

BRIEF FOR UNITED STATES STEEL CORPORATION IN OPPOSITION.

This is a Jones Act case brought to recover for the death of a seaman.

It comes to this Court to review the District Court's ruling on a motion to strike from the amended complaint.

OPINIONS BELOW.

The opinion of the United States District Court, unreported, appears in Petitioner's Appendix at page 37; the opinion of the United States Court of Appeals for the Sixth Circuit is reported in 321 F. 2d 518, and appears in Petitioner's Appendix following page 40.

JURISDICTION.

The judgment of the Court of Appeals was entered July 29, 1963; jurisdiction here is invoked under 28 U. S. C. § 1254(1).

QUESTION PRESENTED.

Whether the District Court correctly struck from the amended complaint allegations asserting a claimed new right to recover for the death of a seaman under the maritime warranty of seaworthiness supplemented by the Ohio Wrongful Death Act, in addition to, and alongside of, the cause of action provided by Congress under the Jones Act, which the District Court upheld.

STATUTES INVOLVED.

The statutes involved are set forth in Petitioner's Appendix, the Jones Act, also known as the Merchant Marine Act, 46 U. S. C. § 688, at p. 22; the Federal Employers' Liability Act, 45 U. S. C. § 51, at p. 22; and the Ohio Wrongful Death Act, Ohio Revised Code § 2125.01, at p. 23.

STATEMENT OF CASE.

Petitioner seeks this Court's ruling on a motion to strike from the amended complaint.

The case has not been tried.

It is not even at issue.

It waits the filing of a second amended complaint in the District Court.

—Maritime Accident Is Here Sued Upon.

Decedent, a seaman on a Great Lakes freighter, was, according to the amended complaint, returning from shore leave to his vessel at the National Tube dock on the Black River in Lorain, Ohio. A ladder was let down to the dock to enable the seaman to board. He slipped, the complaint alleges, on the wet dock, fell into the water, and drowned.

Decedent's administratrix brought this suit, claiming recovery (1) under the Jones Act, 46 U. S. C. § 688, by which Congress made the Federal Employers' Liability Act, 45 U. S. C. § 51, applicable to seamen, and (2) under the maritime warranty of seaworthiness "supplemented" by the Ohio Wrongful Death Act, Ohio Revised Code § 2125.01.

—District Court Grants Motion To Strike From Complaint.

The District Court, Judge Paul Jones, in the Northern District of Ohio, granted Respondent's motion to strike from the amended complaint.

The District Court struck the allegations relating to the maritime warranty of seaworthiness and the allegations concerning the Ohio Wrongful Death Act. The District Court ruled in accordance with *Lindgren v. United States* (1930), 281 U. S. 38 (and many other cases) that the remedy for a maritime tort resulting in the death of a seaman is under the Jones Act. The allegations asserting the cause of action under the Jones Act remain, waiting trial.

—How Ruling on Motion Comes to This Court.

The District Court's ruling, striking from the amended complaint the allegations asserting a claim under the maritime warranty of seaworthiness, supplemented by the Ohio Wrongful Death Act, has reached the doors of this Court in the following manner:

Petitioner, without complying with 28 U. S. C. § 1292 relating to interlocutory orders, appealed the District Court's ruling on the motion to strike to the Court of Appeals for the Sixth Circuit; and Respondent moved to dismiss for want of a final appealable order. Thereupon Petitioner filed a separate action in the Court of Appeals for a writ of mandamus to compel the District Court to reverse its ruling on the motion to strike, requested the Court of Appeals to hear that action with the appeal, and urged the Court of Appeals to treat the ruling on the motion to strike as a final order and review the District Court's ruling.

The Court of Appeals obliged. It ruled on the merits, and in an opinion by Judge McAllister, with the concurrence of Judges Weick and O'Sullivan, affirmed the decision of District Judge Jones.

ARGUMENT.

NO BASIS FOR GRANT OF CERTIORARI IS SHOWN.

From what has been said it is manifest that—

I. PETITIONER ASKS THIS COURT TO SIT AS A DISTRICT COURT TO RULE ON MOTION TO STRIKE FROM AMENDED COMPLAINT.

Apart from its lack of merit, this case is not ripe for consideration by this Court.

The case is not at issue.

Whatever rights Petitioner may have are justiciable under the Jones Act.

Once the issues are framed, and the case tried and reduced to judgment, any complaint Petitioner may have may vanish.

The case, therefore, in its present posture, does not commend itself for review in this Court.

Apart from this—

II. DECISION BELOW IS RIGHT.

Petitioner has a remedy under the Jones Act.

No reason appears to justify Petitioner's call on this Court to sit as a legislature to create a new cause of action for death under the maritime warranty of seaworthiness, supplemented by the Ohio Wrongful Death Act.

1. Decision Is In Accord With Long-Settled Law.

The common law of the land, with respect to negligently caused injuries, gave the shore-based litigant a cause of action for such injuries. But it allowed no action for death. To remedy this, wrongful death statutes were widely adopted. But no court has held that the effect of

such statutes is to give the remedy there provided, and also to write into the common law, apart from the statute, a remedy for death.

Similarly, the common law of the sea, i.e., the general maritime law, provided for the seaman the remedy of maintenance and cure, and gave him a cause of action for injuries suffered by reason of the unseaworthiness of the vessel, its appliances, and its gear. But, as in the case of the common law, the maritime law allowed no action for death. *The Tungus v. Skovgaard* (1959), 358 U. S. 588, 590; *The Harrisburg* (1886), 119 U. S. 199. As Mr. Justice Cardozo in *Cortes v. Baltimore Insular Line, Inc.* (1932), 287 U. S. 367, put it (p. 371):

> "Death is a composer of strife by the general law of the sea * * *."

It was to remedy this, as applied to seamen's cases, that Congress enacted the Jones Act, 46 U. S. C. § 688, to make the provisions of the Federal Employers' Liability Act, 45 U. S. C. § 51, applicable to maritime deaths.

Petitioner thus has a remedy. The remedy is that which Congress has provided. And just as wrongful death acts enacted by states have not been deemed to provide, in addition to the remedy for death provided by such statutes, a separate remedy under the common law of the land, so has it been in the case of the Jones Act. That statute provides, this Court has held, the sole remedy in the case of the death of a seaman, and no separate additional remedy may be had under the maritime warranty of seaworthiness or under state wrongful death acts:

> *Lindgren v. United States* (1930), 281 U. S. 38, 43-47;
>
> *Panama Railroad Company v. Johnson* (1924), 264 U. S. 375, 392;

Northern Coal & Dock Company v. Strand (1928), 278 U. S. 142, 147.

This Court in *Lindgren*, 281 U. S. 38, reviewed the decisions and pointed out that the Jones Act, also known as the Merchant Marine Act (p. 44):

> "necessarily supersedes the application of the death statutes of the several States."

2. Decision Carries Out Congressional Intent.

The Jones Act, 46 U. S. C. § 688, which Congress enacted in 1920, says that "in case of the death" of a seaman, his personal representative may maintain an action for damages,

> "and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees [i.e., the Federal Employers' Liability Act] shall be applicable."

When Congress thus made the Federal Employers' Liability Act applicable to seamen's cases it already had been established by decisions of this Court that in cases of death governed by the Federal Employers' Liability Act the wrongful death act of a state is inapplicable. *St. Louis, San Francisco & Texas Railway Company v. Seale* (1913), 229 U. S. 156, 158; *North Carolina Railroad Company v. Zachary* (1914), 232 U. S. 248, 256. It was well settled, as this Court held in *Seale* (229 U. S. at p. 158):

> "If the Federal statute [i.e., the Federal Employers' Liability Act] was applicable, the state statute [i.e., the Texas Wrongful Death Act] was excluded * * *."

Hence, when Congress made the Federal Employers' Liability Act applicable to seamen's cases, it, under the ordinary canons of construction, took that statute with

the construction this Court had already placed upon it. In the present case, with the Ohio Wrongful Death Act excluded, Petitioner has no claim—apart from the Jones Act. That is why Petitioner—at the cost of violence to language —struggles to write the Ohio Wrongful Death Act into the maritime law. Congress has provided otherwise.

3. No Basis for Dissatisfaction With Existing Law Appears.

Nothing in this record suggests any legitimate basis for dissatisfaction with the existing law. And the argument is not advanced by calling the result "harsh," as Petitioner does (p. 5), or by pretending that the construction adopted by this Court, and followed by the District Court and the Court of Appeals (p. 12) "interprets the Jones Act in such a manner as to diminish seamen's rights * * *." It does no such thing. To the contrary, it makes secure the rights Congress created by the Jones Act.

Indeed, were this Court to reexamine the question, there would be every reason for adhering to the present law. Neither the public good nor the fate of seamen would be enhanced by rewriting the maritime law, as Petitioner suggests. For the uniformity of rule in the adjudication of seamen's cases that the Court has insisted upon, Petitioner would substitute the diversities resulting from the application of numerous and varying state wrongful death statutes. For example, under many such statutes, including the Ohio Wrongful Death Act, contributory negligence would be a complete defense. The statute, if adopted, would come with its full panoply of defenses. *The Harrisburg* (1886), 119 U. S. 199. Seamen's rights would turn, not upon a single nation-wide standard, but upon the ac-

cident of geography, and results would depend upon, and could be controlled by, 50 state legislatures. Congress intended no such result.

CONCLUSION.

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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November 20, 1963.

In the Supreme Court of the United States

No. [redacted] 10

OCTOBER TERM, 1963.

MABEL GILLESPIE,
Administratrix of the Estate of Daniel E. Gillespie, deceased,
Petitioner,

vs.

UNITED STATES STEEL CORPORATION,
a corporation,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

BRIEF FOR THE PETITIONER.

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In the Supreme Court of the United States

No. 582.

OCTOBER TERM, 1963.

MABEL GILLESPIE,
Administratrix of the Estate of Daniel E. Gillespie, deceased,
Petitioner,

vs.

UNITED STATES STEEL CORPORATION,
a corporation,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

BRIEF FOR THE PETITIONER.

OPINION BELOW.

The opinion of the Court of Appeals (R. 29-50) is reported at 321 F. 2d 518 (6th Cir. 1963).

JURISDICTION.

The judgment of the United States Court of Appeals for the Sixth Circuit, affirming the order of the United States District Court for the Northern District of Ohio, Eastern Division, which struck from the petitioner's amended complaint all allegations relating to the general maritime law doctrine of unseaworthiness and the Ohio Wrongful Death Act, was entered on July 29, 1963 (R. 26).

Petition for a writ of certiorari was filed October 24, 1963 and was granted January 6, 1964. 375 U. S. 962 (1964).

The jurisdiction of this Court rests upon 28 U. S. C. 1254(1).

QUESTIONS PRESENTED.

I. Whether suit for wrongful death of a deceased seaman may be maintained against his employer under the general maritime law doctrine of unseaworthiness and the state statute which provides a remedy for wrongful death, where the death occurred in state waters.

II. Whether the classes of beneficiaries named in the Jones Act are mutually exclusive, so that, in a wrongful death action, the existence of a person in one such class precludes recovery by persons in the other class.

III. Whether a claim for conscious pain and suffering against his employer survives the death of a seaman, where the period of pain and suffering for which compensation is claimed is short and immediately preceded his death by drowning.

STATUTES INVOLVED.

The statutes involved are Section 33 of the Merchant Marine Act of 1920, 41 Stat. 1007, 46 U. S. C. Section 688, incorporating the Federal Employers' Liability Act, 45 U. S. C. Section 51, the Ohio Wrongful Death Act, Ohio Revised Code Sections 2125.01 and 2125.02, and the Ohio Survival Statute, Ohio Revised Code Section 2305.21. They are reprinted in Appendix A, *infra*, at pp. 42-45.

STATEMENT OF THE CASE.

Petitioner, Mabel Gillespie, as administratrix of the estate of her deceased son, Daniel E. Gillespie, filed an amended complaint in the district court against the respondent, United States Steel Corporation, for damages arising out of the death of her decedent in Ohio waters while employed by the respondent as a seaman and a member of the crew of one of respondent's steamships, engaged in transportation as a cargo carrier on the Great Lakes (R. 1-6). Jurisdiction of the district court was invoked because the complaint raised questions under a law relating to admiralty and commerce, the Merchant Marine Act of 1920 (Jones Act), and the general federal maritime law. Petitioner's amended complaint sought recovery (1) for herself as dependent mother of the decedent, and for the benefit of her children, dependent sisters and brother of the decedent, for *wrongful death*, and (2) for the estate of the decedent for his *conscious pain and suffering* immediately prior to his death by drowning (R. 5). She sought recovery for *wrongful death* on the alternate grounds of (1) the Merchant Marine Act of 1920 (Jones Act), and (2) the general maritime law of unseaworthiness coupled with the Ohio Wrongful Death Act, and for decedent's *conscious pain and suffering* based upon the alternate theories of liability of (1) the survival provisions of the Merchant Marine Act of 1920 (Jones Act), and (2) the general maritime law of unseaworthiness coupled with the Ohio Survival Statute (R. 1-2).

Respondent filed a motion requesting the trial court to strike from the amended complaint all allegations relating to the general maritime doctrine of unseaworthiness, the Ohio Wrongful Death and Survival Statutes, and the dependent sisters and brother of the decedent as bene-

ficiaries (R. 6-14). The district court granted respondent's motion to strike in its entirety (R. 15-16).

Petitioner appealed from this order to the Sixth Circuit Court of Appeals (R. 16). Respondent filed a motion to dismiss the appeal on the ground that the order appealed from was not final and appealable (R. 17). Before the Court of Appeals heard the motion to dismiss, petitioner and the other named beneficiaries for whom she sued filed a petition for extraordinary relief in the event that the Court of Appeals should rule that the order of the district court from which appellate relief was sought was not final and appealable (R. 18-24). Both the appeal and the application for extraordinary relief were consolidated in the Court of Appeals (R. 24-25).

With the appellate proceedings in this posture, the Court of Appeals ruled as follows:

(1) The court denied the respondent's motion to dismiss the appeal (R. 25).

(2) The Court affirmed the order of the district court below on its merits (R. 26).

(3) The court denied the petition for extraordinary relief (R. 28).

It is the affirmance on its merits of the district court order below by the Court of Appeals from which petitioner seeks relief in this Court.

SUMMARY OF ARGUMENT.

The pre-trial ruling on the pleadings by the district court below, affirmed by the Circuit Court of Appeals for the Sixth Circuit, has effectively barred from this case (1) the petitioner's claim for the wrongful death of her decedent, a seaman, against his employer upon the general maritime law theory of unseaworthiness and the Ohio Wrongful Death Act;[1] (2) certain designated dependent brother and sisters of the decedent as beneficiaries of the wrongful death claim;[2] and (3) petitioner's claim for decedent's conscious pain and suffering prior to his death upon the doctrine of unseaworthiness and the Ohio Survival Statute.[3]

Petitioner contends that each of these holdings of the court below is erroneous. She urges:

First, that the decision of this Court in *Lindgren v. United States*, 281 U. S. 38 (1930), which held that the Jones Act provides the exclusive remedy for death of a

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[1] Upon the ground that the Jones Act, Section 33 of the Merchant Marine Act of 1920, 46 U. S. C. § 688, provides the exclusive remedy for death of a seaman against his employer, and that therefore the unseaworthiness of the vessel, irrespective of negligence, is unavailable as an alternate basis of recovery for the seaman's death, even though such claim is predicated upon the wrongful death statute of the state in which the death-causing injury occurred, *Lindgren v. United States*, 281 U. S. 38 (1930), approved and followed.

[2] Upon the ground that the classes of beneficiaries named in the Jones Act are mutually exclusive, so that, in a wrongful death action governed by its provisions, the existence of a beneficiary in one such class precludes recovery by persons in the other class.

[3] Upon the ground that a claim for conscious pain and suffering does not survive the death of a seaman where the period of pain and suffering for which compensation is claimed is short and immediately preceded his death by drowning, despite the fact that such claim is predicated upon the survival statute of the state in which the death-causing injury occurred. *The Corsair*, 145 U. S. 335, 348 (1892), approved and followed.

seaman against his employer, was incorrectly decided at its inception, that subsequent case experience in contiguous areas has stripped *Lindgren* of any vitality it may have had at the outset, and that this case presents a long overdue opportunity for this Court to re-examine and discard an unjust, illogical and overly-harsh rule which too narrowly delineates the rights of survivors of a seaman whose death resulted from a maritime tort. She urges this Court to rule that, where death occurred in state waters, survivors of a seaman may bring suit for wrongful death against his employer upon the general maritime doctrine of unseaworthiness, notwithstanding the Jones Act remedy which may also be available to them.

Second, that the interpretation of the language of the Jones Act relating to beneficiaries which most nearly satisfies the beneficent purposes of the Act is that the classes of beneficiaries enumerated are *cumulative*, rather than *exclusive;* that, to the extent that *Chicago, B. & Q. R. Co. v. Wells-Dickey Trust Co., Adm'r.*, 275 U. S. 161 (1927), has interpreted the Jones Act differently, it should be overruled; and that, in addition to their participation as beneficiaries of a wrongful death award based upon unseaworthiness and the Ohio wrongful death act (her first argument, *supra*), the beneficiaries excluded by the rulings of the courts below are entitled to participate as beneficiaries of a Jones Act wrongful death award.

Third, the clearly established principle that where a claim for conscious pain and suffering prior to death is based upon the survival statute of the state in which the tortious injury occurred, the survival provisions of the Jones Act and the state survival statute provide a valid basis for such a claim on the theories of both negligence

under the Jones Act and unseaworthiness under the general maritime law, *Holland v. Steag, Inc.*, 143 F. Supp. 203 (D. Mass. 1956), cited with approval in *Kernan v. American Dredging Co.*, 355 U. S. 426, 430, footnote 4 (1958), is applicable here despite the fact that the interval for which claim is made is of short duration and immediately preceded the death of the decedent by drowning.

ARGUMENT.

I.

WHERE THE DEATH OF A SEAMAN OCCURS IN STATE WATERS, SUIT FOR HIS WRONGFUL DEATH MAY BE MAINTAINED AGAINST HIS EMPLOYER UNDER THE GENERAL MARITIME LAW DOCTRINE OF UNSEAWORTHINESS AND THE STATE STATUTE WHICH PROVIDES A REMEDY FOR WRONGFUL DEATH.

The opinion of the Sixth Circuit Court of Appeals from which petitioner here seeks relief is based upon, and revitalizes, the position taken by this Court in *Lindgren v. United States*, 281 U. S. 38 (1930), that the Jones Act[1] provides the exclusive remedy for death of a seaman against his employer and that therefore the unseaworthiness of the vessel, irrespective of negligence, is unavailable as an alternate basis for recovery for the seaman's death, even though such claim is predicated upon the wrongful death statute of the state in which the injury causing death occurred.

Upon such authority and reasoning, the court below affirmed the pre-trial pleading ruling made by the federal district court which struck from the amended complaint all allegations concerning the common law maritime doctrine of unseaworthiness, the Ohio wrongful death act as

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[1] Section 33 of the Merchant Marine Act of 1920, 46 U. S. C. § 688.

it would remedially implement the unseaworthiness doctrine, and all beneficiaries who would participate in a death award under the provisions of the Ohio Wrongful Death Act, but not under the Jones Act.

Thus, the question of the continuing validity of *Lindgren v. United States, supra*, is squarely presented to this Court.[5]

The Court of Appeals noted with approval both of the arguments employed in the *Lindgren* opinion to support the rule that the Jones Act remedy for wrongful death of a seaman against his employer is "paramount and exclusive":[6] (1) that the federal enactment of the Jones Act pre-empted the field of recovery from his employer of damages for a seaman's death,[7] and (2) that the express language of the Jones Act, insofar as it provides for an election by an *injured* seaman between the theories of Jones Act negligence and unseaworthiness, but fails to mention any such election in the language describing his personal representative's claim for his *death*, clearly demonstrates that no alternative death remedy under the maritime law was intended by Congress.[8]

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[5] In response to the Petitioner's contention in the court below that the position taken in *Lindgren* on this point was unsound, and had been eroded by more recent decisions of this Court in contiguous areas, the Court of Appeals remarked:

> "* * * if the prior rule is no longer accepted by the Supreme Court, and *Lindgren v. United States* * * * is to be overruled, the landmarks must be plainer to see; and it would be unbecoming for this Court to base its determination upon the assumption that the holding in *Lindgren* is to be reversed." (R. 46.) (Emphasis supplied.)

[6] *Lindgren v. United States*, 281 U. S. 38, 46 (1930), quoting from *Erie R. R. Co. v. Winfield*, 244 U. S. 170, 172 (1917).

[7] *Lindgren v. United States*, 281 U. S. 38, 43-46 (1930). See Court of Appeals opinion (R. 48).

[8] *Lindgren v. United States*, 281 U. S. 38, 47-48 (1930). See Court of Appeals opinion (R. 42).

The Court of Appeals then sought to implement its judgment that *Lindgren* effectively blocked an alternate unseaworthiness death remedy in this case by noting, as did the district court below [9] that "all of the allegations of the complaint * * * constitute assertions of negligence," and that "[w]hether the negligence was failure to provide safe access to the ship for plaintiff's decedent, or *whether the negligence was a breach of defendant's duty to provide a seaworthy ship*, the action is based upon negligence and proximate cause * * *." (R. 48.) (Emphasis supplied.)

Petitioner contends that at its inception the rule [10] in *Lindgren* was indefensible logically and that subsequent case experience has stripped *Lindgren* of any vitality it may have had, as to both the arguments which were advanced to support the result in that case: (1) federal preemption and (2) the interpretation of the statutory language "at his election" in the Jones Act; and that this

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[9] See Memorandum on Motion to Strike by Jones, J., in the federal district court:

> "A reading of the complaint as to the facts and character of the suit spells 'Jones Act.' The incorporation of the additional legal provisions in the complaint gives no greater right or remedy than that furnished by the Jones Act." (R. 15.)

[10] There has been some difference of opinion in the proceedings below as to whether the language in *Lindgren* asserting that, even where unseaworthiness is the gravamen of the claim, the Jones Act provides an exclusive remedy for the death of a seaman was a square holding or *obiter dictum*. See Mr. Justice Brennan's comment, concurring in part and dissenting in part in *The Tungus v. Skovgaard*, 358 U. S. 588, 606 (1959) and the rejoinder of the Court of Appeals (R. 44-45). Counsel for petitioner has learned enough in these proceedings to engage no further in this academic exercise, particularly before this Court. For here the determination of whether the *Lindgren* rule is controlling rests upon the *validity* of the rule, not its characterization as either *dictum* or decision. Petitioner's position is simply that, whatever the *Lindgren* rule is, it should be discarded.

case presents a long overdue opportunity to this Court to re-examine and discard an unjust, unwarranted and overly-harsh rule which too narrowly delineates the rights of survivors of a seaman whose death resulted from a maritime tort.

Further, petitioner urges that her amended complaint clearly asserts a claim based upon unseaworthiness and that the availability of a remedy in Jones Act negligence does not preclude her from proceeding to trial upon both theories.

Each of these contentions will be considered in detail below.

A.

The Jones Act did not pre-empt the entire field of recovery for maritime wrongful death.

Prior to the enactment of, and in areas not served by the Jones Act, the courts, unsatisfied with the bare recital of the incantation that "[d]eath is a composer of strife by the general law of the sea * * *" [11] as a substitute for a solution to the problem of the harsh rule of non-survivability of common law maritime death claims, had established that the general maritime doctrine of unseaworthiness *did* provide a theory of recovery for wrongful death, both in seamen's suits against their employers and otherwise, by utilizing the state wrongful death statute in whose jurisdiction the death occurred to supply a remedy for death to complement the substantive general maritime doctrine of unseaworthiness. *The Hamilton*, 207 U. S. 398 (1907); *Great Lakes Dredge & Dock Co. v. Kierejewski*, 261 U. S. 479 (1923); and see *Cortes v. Baltimore Insular*

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[11] *Cortes v. Baltimore Insular Line, Inc.*, 287 U. S. 367, 371 (1932). cf. Gilmore & Black, *The Law of Admiralty* 302-303 (1957).

Line, 287 U. S. 367 (1932); *Western Fuel Co. v. Garcia*, 257 U. S. 233 (1921).

In this context of existing law, both the Jones Act, which provided a remedy for wrongful death caused by the negligence of the decedent-seaman's employer where the death occurred in state waters, and the Death on the High Seas Act, 41 Stat. 537, et seq., 46 U. S. C. Sections 761-768, which provided a remedy for wrongful death where the death occurred beyond a marine league from state shores, were enacted in 1920 at the same session of Congress. That the latter piece of legislation was intended by the *same Congress that enacted the Jones Act* to fill a void in wrongful death recovery and to *supplement* the state wrongful death remedies rather than *eliminate* them is clearly demonstrated by the express statutory direction in the Death on the High Seas Act (41 Stat. 538, 46 U. S. C. Section 767) "that the provisions of any state statute giving or regulating rights of action or remedies for death *shall not be affected by this Act.*" (Emphasis supplied.) *Western Fuel Co. v. Garcia*, 257 U. S. 233, 243 (1921).[12] One might well conclude, despite a lack of comparable legislative history of the Jones Act itself, that Congress would not have intentionally *eliminated* state death remedies for unseaworthiness where the decedent was a *seaman*, while expressly refusing to do so in cases involving *non-*

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[12] And see Mr. Justice Stewart's language in the majority opinion in *The Tungus v. Skovgaard*, 358 U. S. 588, 593 (1959):

"The legislative history of the Death on the High Seas Act discloses a clear congressional purpose to leave 'unimpaired the rights under State statutes as to deaths on waters within the territorial jurisdiction of the States.' S. Rep. No. 216, 66th Cong. 1st Sess. 3; H. R. Rep. No. 674, 66th Cong. 2d Sess. 3. The record of debate in the House of Representatives preceding passage of the bill reflects deep concern that the power of the States to create actions for wrongful death in no way be affected by enactment of the federal law. 59 Cong. Rec. 4482-4486."

seaman decedents, except that in *Lindgren v. United States*, 281 U. S. 38 (1930), this Court used language which has been interpreted by some to be just such a holding.[13]

Although this was solely a Jones Act death case in which unseaworthiness was never pleaded as a basis for liability, the Court in *Lindgren* took occasion to remark that the Jones Act wrongful death remedy was exclusive and precluded recovery for death by reason of the unseaworthiness of the vessel.

With respect to the question of federal pre-emption of the field of maritime death remedies as between seaman and employer, however, the Court's reasoning was quite explicit.[14] Since the general maritime law provided no re-

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[13] E.g., *Schlichter v. Port Arthur Towing Co.*, 288 F. 2d 801 (5th Cir. 1961) cert. den. 368 U. S. 828 (1961); *Lee v. Pure Oil Co.*, 218 F. 2d 711 (6th Cir. 1955); *Gill v. United States*, 184 F. 2d 49 (2d Cir. 1950); *Robbins v. Esso Shipping Co.*, 190 F. Supp. 880 (S. D. N. Y. 1960); *Bath v. Sargent Line Corp.*, 166 F. Supp. 311 (S. D. N. Y. 1958). But cf. Justice Brennan, concurring in part and dissenting in part on other facts in *The Tungus v. Skovgaard*, 358 U. S. 588, 606-07 (1959):

> "The opinion [in *Lindgren v. United States*] dealt primarily with the effect of the Jones Act's wrongful death provision in removing the seaman's right to invoke the remedies of state Death Acts for the identical gravamen of negligence. And, *although the libel did not allege unseaworthiness*, the Court *briefly observed* that the Jones Act's death provision would be construed equally as foreclosing a state statute's use on that count." (Emphasis supplied.)

[14] A careful reading of *Lindgren* demonstrates that the reference to federal pre-emption in the Court's opinion was in response only to the libellant's contention that the state wrongful death statute should be applied to supply an alternate remedy to that provided by the Jones Act, where the liability charged was solely *negligence*, not *unseaworthiness*. That argument is not advanced in the instant case; however, since the Court of Appeals below failed to make this distinction, but, rather, ruled that the Jones Act pre-empted the field of maritime death remedies, including state remedies for death by *unseaworthiness*, as well as *negligence* [Court of Appeals Opinion (R. 42)] petitioner will, in the text which follows, meet this contention.

covery for death by maritime tort, state statutes could be employed to provide relief in the absence of federal legislation on the subject. But when the Jones Act undertook to provide a federal death remedy in claims based upon negligence in the Jones Act, that legislation, "as it covers the entire field of liability for injuries to seamen, * * * is paramount and exclusive, and supersedes the operation of all state statutes dealing with that subject."[15]

It is petitioner's intention to demonstrate that a finding that the Jones Act pre-empted the entire field of seamen's injuries was unsupportable at its inception in *Lindgren*, and that subsequent interpretations of Congressional intent have made such a finding at best, a historical curiosity—at worst, a hoary blunder of the past perpetuated by *stare decisis* into an unjust rule of the present.

Even though there has been a federal legislative enactment in the field, the doctrine of federal pre-emption cannot be applied to supersede the operation of state statutes in the same area in the absence of a clear manifestation of the intent of Congress to exclude States from exerting their police power in the field.[16] "Its [Congress's] purpose to displace the local law must be definitely expressed." *H. P. Welch Co. v. New Hampshire*, 306 U. S. 79, 85 (1938). "This is especially the case when public safety and health are concerned." *Maurer v. Hamilton*, 309 U. S. 598, 614 (1940). Moreover, "[t]here is no constitutional rule which compels Congress to occupy the

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[15] *Lindgren v. United States*, 281 U. S. 38, 47 (1930).

[16] This principle had been clearly established by this Court before, and followed since *Lindgren* was decided. E.g., *Reid v. Colorado*, 187 U. S. 137, 148 (1902); *Illinois Central R. Co. v. Public Utility Comm.*, 245 U. S. 493, 510 (1918); *Napier v. Atlantic Coast Line R. Co.*, 272 U. S. 605, 611 (1926); *Kelly v. Washington*, 302 U. S. 1, 9-10 (1937); *H. P. Welch Co. v. New Hampshire*, 306 U. S. 79, 85 (1939); *Maurer v. Hamilton*, 309 U. S. 598, 614 (1940); *Allen-Bradley Local v. Wisconsin Employment Relations Board*, 315 U. S. 740, 749 (1942).

whole field. Congress may circumscribe its regulation and occupy only a limited field. When it does so, state regulation outside that limited field * * * is not forbidden or displaced * * * [T]he exercise by the State of its police power * * * is superseded only where the repugnance or conflict is so 'direct and positive' that the two acts cannot 'be reconciled or consistently stand together'." *Kelly v. Washington*, 302 U. S. 1, 10 (1937).

"But the intent to supersede the exercise by the State of its police power * * * is not to be implied unless the act of Congress fairly interpreted is in actual conflict with the law of the State." *Savage v. Jones*, 225 U. S. 501, 533 (1912). And, moving from the general to the specific facts of this case, "[*w*]*hen the State is seeking to prevent the operation of unsafe and unseaworthy vessels in going to and from its ports*, it is exercising a protective power akin to that which enables the State to exclude diseased persons * * *. When the State is seeking to protect a vital interest, [this Court has] always been slow to find that the inaction of Congress has shorn the State of the power which it would otherwise possess." *Kelly v. Washington*, 302 U. S. 1, 14 (1937). (Emphasis and bracketed material supplied.)

Four general principles of statutory construction emerge from these cases:

1. If the federal pre-emption doctrine is to be applied, there must be a clear expression of Congressional intention to displace the entire local law by its legislative enactment, *H. P. Welch Co. v. New Hampshire, supra*, particularly where public safety is involved, *Maurer v. Hamilton, supra*.

2. Such broad intention cannot be implied unless the act of Congress fairly interpreted is actually in conflict with the local law. *Savage v. Jones, supra*.

3. When Congress does not occupy an entire field, but only a limited field within the general substantive area, state regulation outside, and not in conflict with, that limited field of federal legislation is not forbidden or displaced, *Kelly v. Washington, supra.*

4. Where the state is seeking to protect a vital interest (such as the prevention of operation of unsafe and unseaworthy vessels in its waterways) the failure of the Congress to fully occupy an entire field should ordinarily not be interpreted to indicate an intention to nullify the state's exercise of its police power in the limited area in which Congress has not legislated. *Kelly v. Washington, supra.*

It is submitted that (1) there was no clear expression of congressional intention by the enactment of the Jones Act to displace the entire local wrongful death act as it was applied to maritime injuries; (2) the Jones Act, fairly interpreted, is not in conflict with the continued operation of the local wrongful death act as it applies to maritime injuries, but merely supplies an *additional* remedy to seamen, and therefore a broad intention to pre-empt the entire field cannot be implied; (3) the Jones Act occupies only a limited field within the general substantive area of remedies for maritime injury and death, and state wrongful death acts, not being in conflict with, but outside that limited field of federal legislation, are not forbidden or displaced; (4) since the state by its enactment of its wrongful death act is, as it is applied to maritime injuries, seeking to protect a vital interest, Congress's failure by the enactment of the Jones Act to fully occupy the entire field of seamen's death remedies should not be interpreted to indicate an intention to nullify the state's exercise of its police power in the limited area in which Congress has not legislated, i.e.,

the death remedy based upon unseaworthiness and the local wrongful death act.

The application of these principles of statutory construction to the Jones Act compels the conclusion that this federal enactment did not, nor was it ever intended by Congress, to cover "the entire field of liability for injuries to seamen,"[17] despite language to the contrary in the *Lindgren* opinion.

For it is evident that the Jones Act was enacted to *enhance* rather than *diminish* the rights of the seaman and his personal representative in the event of his injury or death in the course of his employment. As Justice Brennan, speaking for Chief Justice Warren and Justices Black, Douglas and Clark in *Kernan v. American Dredging Co.*, 355 U. S. 426, 431-432 (1958), has described the background of the enactment of such special industrial legislation as the Federal Employers' Liability Act, and the Jones Act, into which the F. E. L. A. is specifically incorporated:

> "It is true that at common law the liability of the master to his servant was founded wholly on tort rules of general applicability and the master was granted the effective defenses of assumption of risk and contributory negligence. This limited liability derived from a public policy, designed to give maximum freedom to infant industrial enterprises, 'to insulate the employer as much as possible from bearing the 'human overhead' which is an inevitable part of the cost—to someone—of the doing of industrialized business.' *Tiller v. Atlantic Coast Line R. Co.*, 318 U. S. 54, 59. But it came to be recognized that, whatever the rights and duties among persons generally, the industrial employer had a special responsibility toward his workers, who were daily exposed to the risks

[17] *Lindgren v. United States*, 281 U. S. 38, 47 (1930).

> of the business and who were largely helpless to provide adequately for their own safety. Therefore, as industry and commerce became sufficiently strong to bear the burden, the law, the reflection of an evolving public policy, came to favor compensation of employees and their dependents for the losses occasioned by the inevitable deaths and injuries of industrial employment, thus shifting to industry the 'human overhead' of doing business. For most industries this change has been embodied in Workmen's Compensation Acts. In the railroad and shipping industries, however, the FELA and Jones Act provide the framework for determining liability for industrial accidents. But instead of a detailed statute codifying common law principles, Congress saw fit to enact a statute of the most general terms, thus leaving in large measure to the courts the duty of fashioning remedies for injured employees in a manner analogous to the development of tort remedies at common law. *But it is clear that the general congressional intent was to provide liberal recovery for injured workers, Rogers v. Missouri Pacific R. Co.*, 352 U. S. 500, 508-510, and *it is also clear that Congress intended the creation of no static remedy, but one which would be developed and enlarged to meet changing conditions and changing concepts of industry's duty toward its workers.*" (Emphasis supplied.)

Add to this consideration the fact that "[s]eamen are the wards of admiralty, and the policy of the maritime law has ever been to see that they are accorded proper protection by the vessels on which they serve,"[18] and the position taken by the *Lindgren* Court becomes even less tenable.

Unfortunately, one of the prime tools in ascertaining

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[18] *The State of Maryland*, 85 F. 2d 944, 945 (4th Cir. 1936). And see, Jackson, J. dissenting in *Pope & Talbot, Inc. v. Hawn*, 346 U. S. 406, 424-425 (1953), pointing out some of the reasons behind the preferential treatment given seamen by the law.

legislative intention is not available. The Jones Act effected a sweeping change in the responsibility of maritime employers to their employees in a brief paragraph with no record of Congressional debate or committee report.[19] But, whatever the reason for such lack of legislative assistance in interpreting this brief but troublesome Congressional act, the sequence of Congressional action in the field of maritime injuries in response to decisional law, considered as a motion picture rather than a still snapshot, sharpens and clarifies the picture of legislative intention.

Prior to 1915, a seaman was "not allowed to recover * * * for the negligence of the master, or any member of the crew * * *." *The Osceola*, 189 U. S. 158, 175 (1903). Nor, by that same authority could he "recover for injuries sustained through the negligence of [a fellow servant]" *Ibid.*

In 1915, Congress passed "[a]n Act to promote the welfare of American seamen in the merchant marine of the United States * * *." 38 Stat. 1164 (1915). In an attempt to alleviate the harsh rule of *The Osceola*, Section 20 provided, in pertinent part:

> "That in any suit to recover damages for any injury * * * seamen having command shall not be held to be fellow-servants with those under their authority." 38 Stat. 1185 (1915).

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[19] See comment of Gilmore and Black, *The Law of Admiralty*, 281-282 (1957):

> "* * * Section 33 [of the Merchant Marine Act of 1920] was a little noticed provision, unrelated to the balance of the statute. As it made its way through committee to the floor of House and Senate, it can hardly have drawn much attention. In due course its constitutionality * * * was upheld by a Supreme Court which might better have struck it down as offensive to the due process clause by reason of impossibly bad drafting."

As Gilmore and Black[20] have interpreted this legislative action:

> "By those few lines the Congress apparently intended to change the maritime law as stated in The Osceola under which an injured seaman could recover more than his maintenance and cure only in an action based on unseaworthiness and could not recover damages for negligence of master or crew in the navigation or management of the ship. At least, if that was not the intention, no one has ever been able to suggest what the intention was. The draftsman of Section 20 had evidently read the [fellow-servant] proposition in The Osceola to mean that the reason why seamen could not recover damages for negligence was that all the members of the crew were fellow-servants and consequently the negligence of each was attributed to all, thus barring the action; on that reading, the abolition of the fellow-servant relationship removed the only barrier to recovery and the action could be maintained under maritime law with no need for affirmative Congressional action."

But with the decision in *Chelentis v. Luckenbach S. S. Co., Inc.*, 243 F. 536 (2d Cir. 1917), aff'd 247 U. S. 372 (1918), it became apparent that the bad drafting of the Act of 1915 was to frustrate the Congressional purpose. For, while eliminating one impediment to seamen's recovery for negligence (the fellow-servant doctrine), it had failed to expressly eliminate the other obstacle imposed by *The Osceola* to a seaman's claim for injuries resulting from negligence, *i.e.*, the express prohibition of recovery "for the negligence of the master, or any member of the crew." [21]

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[20] Gilmore and Black, *The Law of Admiralty* 279-280 (1957).

[21] *The Osceola*, 189 U. S. 158, 175 (1903).

While there has been some criticism of this technical holding of the Court,[22] in fact it stimulated Congress to clarify its intention with respect to the expansion of seamen's right to recover from their employers for active negligence as well as for unseaworthiness of the vessel. For scarcely two years later the Jones Act, incorporating the liability provisions for negligence of the Federal Employers Liability Act, was enacted by Congress.

It is apparent from this recital of events that Congressional activity during this period at all times was directed toward the attempted *expansion* of the theories upon which a seaman's claim against his employer might be brought, expansion to include active negligence as a basis of recovery, not the *elimination* of any remedies that he already had by virtue of the doctrine of unseaworthiness supplemented by local wrongful death acts. For "it is clear that the general congressional intent was to provide liberal recovery for injured workers * * *." *Kernan v. American Dredging Co.*, 355 U. S. 426, 432 (1958).

All of the foregoing indicia of Congressional purpose in enacting the Jones Act were available to the *Lindgren* Court and should have compelled a different conclusion so

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[22] See comment of Gilmore and Black, *The Law of Admiralty* 281 (1957):

"On the 'how to read cases' level, there can be no quarrel with the Chelentis holding. It is another matter whether Congress should have been made to put on the dunce cap and stand in the corner. If Section 20 had been given its obvious (indeed its only) meaning, the Court would have spared much grief to itself, to the inferior federal judiciary, to the bar and to all parties litigant. The theory of Section 20 had been that, with the removal of the only maritime law bar to recovery, the seaman's action for negligence could proceed on ordinary maritime law principles and there would no longer have been any need to distinguish between unseaworthiness and operating negligence. It must be a matter of regret that the Court refused this simple solution and instead goaded Congress into doing it the hard way."

far as separate unseaworthiness death claims were concerned.

But subsequent case law in the maritime field, with the clarity offered by hindsight, makes yet more dazzlingly lucid what was only somewhat less clear at the time *Lindgren* was decided: that the Jones Act was never intended by Congress to occupy the entire field of seamen's claims for injury and death, but was, rather, intended to plug the gap created by *The Osceola* and provide seamen a remedy against their employers' active negligence *in addition* to the one *The Osceola* gave them for unseaworthiness.

The decisional landscape in the area of survivability of maritime torts has been drastically altered in the thirty-four years since *Lindgren* was decided. The unseaworthiness doctrine has been expanded so that it, and not the Jones Act "has become the principal vehicle for personal injury recovery."[23] Unseaworthiness now includes operating negligence, *Mahnich v. Southern S. S. Co.*, 321 U. S. 96, 100 (1944), although the absolute duty imposed upon the shipowner to provide a seaworthy vessel requires no such showing. *Seas Shipping Co. v. Sieracki*, 328 U. S. 85 (1946).

Moreover, "[t]he implacable effect of death on causes of action under the general maritime law has been blunted by recent decisions."[24] This Court has employed state statutes to alter the venerated maritime rule that a tort-

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[23] Gilmore and Black, *The Law of Admiralty* 315 (1957). And see discussion, pp. 315-316: "* * * in another ten years the Jones Act will have become a faint and ghostly echo and the law of recovery for maritime injuries will be stated in terms of unseaworthiness alone."

Seven years have passed since this prediction: its accuracy may be tested by the intervening case law.

[24] *Burns v. Marine Transport Lines, Inc.*, 207 F. Supp. 276, 280 (S. D. N. Y. 1962).

feasor's liability dies with the tortfeasor. *Just v. Chambers*, 312 U. S. 383, 668 (1941); cf. *Cox v. Roth*, 348 U. S. 207 (1955). An action against the vessel owner based upon the applicable state wrongful death statute and the general maritime doctrine of unseaworthiness may be maintained for death of a *non-seaman* employed aboard a vessel at the time of his death. *The Tungus v. Skovgaard*, 358 U. S. 588 (1959); and see *Holley v. The Manfred Stansfield*, 269 F. 2d 317 (4th Cir. 1959); and *O'Leary v. United States Lines Co.*, 215 F. 2d 708 (1st Cir. 1954), *cert. den.* 348 U. S. 939 (1955). If the death occurs beyond a marine league from shore a wrongful death action based upon unseaworthiness may be brought under the Death on the High Seas Act. *Kernan v. American Dredging Co.*, 355 U. S. 426 (1958); *McLaughlin v. Blidberg Rothchild Co.*, 167 F. Supp. 714 (S. D. N. Y. 1958); *Chermesino v. Vessel Judith Lee Rose, Inc.*, 211 F. Supp. 36 (D. Mass. 1962) *aff'd* 317 F. 2d 927 (1st Cir. 1963), *cert. den.* 375 U. S. 931. By the use of local survival statutes, claims based upon unseaworthiness against a shipowner-employer for *conscious pain and suffering* for injuries accrued prior to the decedent-seamen's death survive. *Holland v. Steag, Inc.*, 143 F. Supp. 203 (D. Mass. 1956), cited with approval in *Kernan v. American Dredging Co.*, 355 U. S. 426, 430, footnote 4 (1958); accord: *McLaughlin v. Blidberg Rothchild Co.*, 167 F. Supp. 714 (S. D. N. Y. 1958); cf. *Just v. Chambers*, 312 U. S. 383 (1941). Claims for maintenance and cure survive the death of the seaman. *Sperbeck v. A. L. Burbank & Co., Inc.*, 190 F. 2d 449 (2nd Cir. 1951). And the intention of this Court to grant similar remedies for substantive rights arising out of the same maritime wrong has been very recently demonstrated. *Fitzgerald v. United States Lines Co.*, 374 U. S. 16 (1963). Nor does the Jones Act provide such an exclusive remedy

to seamen as to preclude recovery for unseaworthiness for a seaman's personal injury if his injuries are not severe enough to cause his death. *Mahnich v. Southern S. S. Co.*, 321 U. S. 96, 100 (1944); *Seas Shipping Co. v. Sieracki*, 328 U. S. 85 (1946).

As a consequence of these holdings, there remains but one set of facts in which all general maritime rights are not available to the victim of a maritime tort or his beneficiaries. This results only under circumstances, as in the instant case, where all of the following factors co-exist:

1. The victim must be injured severely enough to be killed.
2. The victim must be a seaman.
3. The victim's death must have occurred in state waters.
4. Suit must have been filed against the victim's employer.
5. The suit must be for wrongful death.

Contemplating the law in this posture as it applies to the concept of federal pre-emption, several immediate questions come to mind. Could Congress have intended the Jones Act to be an exclusive remedy for *death-causing injuries*, but not for *non-fatal injuries*? Did Congress intend by the enactment of the Jones Act to eliminate claims for *wrongful death* based upon unseaworthiness and local remedial statutes, but not claims for decedent's *conscious pain and suffering* prior to death? Did Congress attempt to deal more harshly with *seamen's* claims for injury and death than with *non-seamen's* similar claims, by denying representatives of *seamen* the right to sue under the general maritime doctrine of unseaworthiness, while permitting *non-seamen's* representatives to do so? Can Congress have intended different results in a seaman's wrongful death claim based upon unseaworthiness,

depending upon whether the death occurred *in state waters* or *a marine league out to sea*? The mere posing of these questions indicates that a Congress operating on any rational basis could not and did not have such legislative purposes. As a consequence, the argument that the Jones Act pre-empted the entire field of seamen's remedies for injury and death was, at the time *Lindgren* was decided, and is now, hopelessly indefensible.

Thus, only *Lindgren* now stands in the path of the general tort proposition that all the rights which a claimant had before he died are available in some form to his personal representative upon his death.

This observation is not a compulsive plea for legal symmetry for its own sake. The vast philosophic gulf between *Lindgren* and the other decided cases "indicate[s] something wrong at the beginning or that something has become wrong since then. [It] also show[s] that correction, though in process, is incomplete." [25]

B.

Interpretation of the statutory language of the Jones Act fails to demonstrate a Congressional finding that unseaworthiness is not available as an alternative maritime death remedy to Jones Act negligence.

After dealing with the subject of federal pre-emption of local laws by the Jones Act,[26] the Court in *Lindgren* remarked:

> "Nor can the libel be sustained as one to recover indemnity for [decedent's] death under the old maritime rules on the ground that the injuries were occa-

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[25] *Georgetown College v. Hughes*, 130 F. 2d 810, 812 (D. C. Cir. 1942).

[26] In response to a contention not urged here. See footnote 11, *supra*.

> sioned by the unseaworthiness of the vessel. * * * [A]n insuperable objection to this suggestion is that the prior maritime law * * * gave no right to recover indemnity for the death of a seaman, although occasioned by the unseaworthiness of the vessel * * *. Apparently for this reason the words 'at his election'—which appear in the first clause of [the Jones Act], relating to the personal right of action of an injured seaman, and * * * gave him, as alternative measures of relief 'an election between the right under the new rule to recover compensatory damages for injuries caused by negligence and the right under the old rules to recover indemnity for injuries occasioned by unseaworthiness'[27]—were omitted from the second clause of [the Jones Act], relating to the right of the personal representative to recover damages for the seaman's death, since there was no right to indemnity under the prior maritime law which he might have elected to pursue." *Lindgren v. United States*, 281 U. S. 38, 47-48 (1930). (Emphasis and bracketed material supplied.)

Thus, the Court, to bolster its contention that the Jones Act recognized that there was no remedy based upon unseaworthiness for a wrongful death claim arising out of a seaman's death in state waters, and by its enactment did not seek to provide any such remedy, urged that the omission of the words "at his election" from the second clause of the Jones Act dealing with *wrongful death claims* was significant in view of the appearance of these words in the first clause dealing with *injury claims*. The Court argued that this statutory language demonstrates that the seaman's representatives had no election between the theories of negligence and unseaworthiness because the unseaworthiness remedy was not available to them at all; only,

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[27] Citing *Pacific S. S. Co. v. Peterson*, 278 U. S. 130, 139 (1928).

in the case where a seaman survived his injury was he required to elect between pursuing his claim upon the basis of negligence or unseaworthiness. Therefore, the Court's reasoning was based upon the interpretation that the "election" mentioned in the statute was the seaman's required election between pursuing his claim for negligence or unseaworthiness.[28] But with the procedural determination that a seaman was required to plead both grounds of recovery[29] and elect between them before reaching the jury,[30] it became increasingly difficult, as the factual distinctions between the two grounds gradually melted away,[31] for seamen-claimants to make a choice which was not "both meaningless and impossible."[32] To relieve this cruel choice, the courts interpreted the "election" language of the Jones Act to mean that a seaman was required to elect *procedurally* between a suit in admiralty and a civil action at law, specifically rejecting the meaning assigned to the Jones Act language by the

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[28] An interpretation derived from language in *Pacific S. S. Co. v. Peterson*, 278 U. S. 130, 137-138 (1928) and *Baltimore S. S. Co. v. Phillips*, 274 U. S. 316 (1927). And see *Robinson, Admiralty*, 335 (1939). Note that even under this rule, maintenance and cure was a cumulative remedy to that provided by the Jones Act, and a seaman did not have to elect between them. *Pacific S. S. Co. v. Peterson*, 278 U. S. 130 (1928).

[29] *Baltimore S. S. Co. v. Phillips*, 274 U. S. 316 (1927).

[30] *Pacific S. S. Co. v. Peterson*, 278 U. S. 130 (1928).

[31] E.g., see *Michalic v. Cleveland Tankers, Inc.*, 364 U. S. 325 (1960); *Vickers v. Tumey*, 290 F. 2d 426 (5th Cir. 1961); *Full v. Esso Standard Oil Co.*, 297 F. 2d 411 (5th Cir. 1961) *cert. den.* 371 U. S. 814 (1962) (recovery for negligent failure to comply with the absolute duty to furnish a seaworthy vessel). And see *Kernan v. American Dredging Co.*, 355 U. S. 426 (1958) (recovery under Jones Act for non-negligent violations of coast-guard regulations). Cf. Frankfurter, J., concurring in *Pope & Talbot, Inc. v. Hawn*, 346 U. S. 406, 418 (1954): "• • • [I]t will be rare that the circumstances of an injury will constitute negligence but not unseaworthiness."

[32] Gilmore and Black, *The Law of Admiralty* 292 (1957).

Lindgren Court: that a seaman had to elect between *substantive* grounds of recovery.[33] And when this Court in *McAllister v. Magnolia Petroleum Co.*, 357 U. S. 221, 222 (1958), ratified this liberal interpretation of the words, "at his election," the already shaky rationale for the *Lindgren* decision toppled entirely and *Lindgren* became clearly visible as what it has always been: a rule in search of a reason. For while the rationale of *Lindgren* was based upon the view that a seaman was required to "elect" whether to pursue a negligence recovery under the Jones Act or recover under the general maritime doctrine of unseaworthiness, since that case was decided, it has become clear that a seaman need *not* elect between Jones Act negligence and unseaworthiness, but may proceed to judgment alternatively on both and his verdict will be sustained on appeal if there is no demonstrable prejudicial error as to one of them. *McAllister v. Magnolia Petroleum Co.*, 357 U. S. 221 (1958).

Nor is the *Lindgren* conclusion any more rehabilitated by history than by the statutory language of the Jones Act. For the Court's contention that "there was no right to indemnity under the prior maritime law which [the personal representative of the decedent-seaman] might have elected to pursue"[34] is not historically accurate, quite apart from the Court's attempt to force the statutory

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[33] *Branic v. Wheeling Steel Corp.*, 152 F. 2d 887 (3rd Cir. 1946), *cert. den.* 327 U. S. 801 (1946); *German v. Carnegie-Illinois Steel Corp.*, 156 F. 2d 977 (3rd Cir. 1946); *McCarthy v. American Eastern Corp.*, 175 F. 2d 724, 725 (3rd Cir. 1949) *cert. den.* 338 U. S. 868 (1949); *Balado v. Lykes Bros. S. S. Co.*, 179 F. 2d 943 (2d Cir. 1950); *Williams v. Tide Water Asso. Oil Co.*, 227 F. 2d 791 (9th Cir. 1955), *cert. den.* 350 U. S. 960 (1956); Cf. *Pope & Talbot, Inc. v. Hawn*, 346 U. S. 406 (1954). And see Gilmore and Black, *The Law of Admiralty*, §§ 6-23 through 6-25 (1957).

[34] *Lindgren v. United States*, 281 U. S. 38, 48 (1930).

language into recognition of such a principle. For, as Mr. Justice Stewart has described the development of the case law in this area in *Hess v. United States*, 361 U. S. 314, 318-19 (1960):

> "Although admiralty law *itself* confers no right of action for wrongful death, *The Harrisburg*, 119 U. S. 199, yet 'where death * * * results from a maritime tort committed on navigable waters within a State whose statutes give a right of action on account of death by wrongful act, the admiralty courts will entertain a libel *in personam*, for the damages sustained by those to whom such right is given.' *Western Fuel Co. v. Garcia*, 257 U. S. 233, 242. See *The Hamilton*, 207 U. S. 398; *LaBourgogne*, 210 U. S. 95; *Levinson v. Deupree*, 345 U. S. 648; *The Tungus v. Skovgaard*, 358 U. S. 588; *United Pilots Ass'n. v. Halecki*, 358 U. S. 613." (Emphasis supplied.)

And reason compels this result, for "[I]t would be a strained statement of the effect of *The Harrisburg* [119 U. S. 199 (1886)] to say that there was no duty imposed by the maritime law not to kill persons through breach of the duty of seaworthiness." [35]

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Despite the original invalidity of *Lindgren v. United States* and the body blows dealt *Lindgren* by the subsequent case law, that decision will not disappear *sua sponte* solely as a result of its own logical inconsistencies and lack of harmony with our current social values. For in spite of its infirmities, *Lindgren* is still considered to be compelling precedent by the Court of Appeals below [36] and

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[35] Brennan, J., concurring in part and dissenting in part in *The Tungus v. Skovgaard*, 358 U. S. 588, 601 (1959).

[36] Court of Appeals opinion (R. 46).

other inferior courts.[17] Many of these courts have followed *Lindgren* protestingly, haltingly, and crying out against its logical barrenness and basic injustice. E.g., *Fall v. Esso Standard Oil Co.*, 297 F. 2d 411, 417 (5th Cir. 1961):

> "We feel compelled to hold that the general maritime law, unaided by the Jones Act, *anomalously, archaically, unnecessarily* in terms of general principles, gives [plaintiff] no right of action." (Emphasis supplied.)

And see *Mortenson v. Pacific Far East Line, Inc.*, 148 F. Supp. 71, 73 (N. D. Cal. 1956):

> "If this disparity in actions for personal injuries and wrongful death is deplorable, the remedy is not for this Court."

And in *Gill v. United States*, 184 F. 2d 49, 57 (2nd Cir. 1950), Judge Learned Hand attacked the logical basis of the *Lindgren* decision with unassailable force:

> "Is a vessel owner liable for a seaman's * * * death within the territorial waters of a state, when it is caused by the unseaworthiness of the vessel? I have no doubt that the death was owing to the respondent's 'wrongful act, neglect or default,' as the New Jersey Act uses those words; but in Lindgren v. United States, 281 U. S. 38 * * *, the Supreme Court held that the Jones Act, 46 U. S. C. A. § 688, superseded a state statute creating such a claim * * *. Since then, the Court has indeed decided that a seaman may recover for injuries suffered from the ship's unseaworthiness, Mahnich v. Southern S. S. Co., 321 U. S. 96, 100 * * *, and the same is true of longshoremen, Seas Shipping Co. v. Sieracki, 328 U. S. 85 * * *.

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[17] *Schlichter v. Port Arthur Towing Co.*, 288 F. 2d 801 (5th Cir. 1961); *Robbins v. Esso Shipping Co.*, 190 F. Supp. 880 (S. D. N. Y. 1960); *Bath v. Sargent Line Corp.*, 166 F. Supp. 311 (S. D. N. Y. 1958); *Lee v. Pure Oil Co.*, 218 F. 2d 711 (6th Cir. 1955); *Gill v. United States*, 184 F. 2d 49 (2nd Cir. 1950).

> I find it hard to understand why the rationale of Lindgren v. United States, *supra*, ought not to have forbidden recovery in either of these instances. If the Jones Act 'covers the entire field of liability for injuries to seamen' * * * and 'is paramount and exclusive,' why does it not supersede injuries arising from unseaworthiness which do not result in death, as well as those which do? * * * *Yet I must own to the greatest doubt whether the Court would today so hold.*" (Emphasis supplied.)

To this plea for a rational rule to administer, this Court owes a clear response. For this Court has "a most extensive responsibility of fashioning rules of substantive law in maritime cases * * *. This responsibility places on this Court the duty of assuring that the product of the effort be coherent and rational." [38]

"When it appears that a challenged doctrine has been uncritically accepted as a matter of course by the inertia of repetition * * * the Court owes it to the demands of reason, on which judicial law-making power ultimately rests for its authority, to examine its foundations and validity" [39] and, having done so, to remove *Lindgren* from the judicial landscape by expressly overruling it.

C.

Plaintiff's amended complaint asserts a claim based on unseaworthiness for which she is entitled to proceed to trial.

There remains for consideration the question of whether petitioner's amended complaint asserts a claim based upon unseaworthiness sufficient to raise the ques-

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[38] Brennan, J., concurring in part and dissenting in part in *The Tungus v. Skovgaard*, 358 U. S. 588, 611 (1959).

[39] Frankfurter, J., dissenting in *Mitchell v. Trawler Racer, Inc.*, 362 U. S. 539, 550 (1959).

tions considered in arguments I(A) and I(B), *supra*, pp. 10-30.

Both of the courts below placed great emphasis upon their finding that "all of the allegations of the complaint * * * constitute assertions of negligence,"[4] apparently to support their conclusion that petitioner's sole relief is under the Jones Act. Petitioner's position is that her amended complaint adequately presents and preserves for review a wrongful death claim based upon unseaworthiness, and that her reliance, in the alternative, upon allegations of negligence under the Jones Act does not divest her of her general maritime rights, nor prevent her from going to trial on both grounds.

Petitioner's amended complaint clearly establishes her claim based upon unseaworthiness for wrongful death. Apart from other allegations, her reliance upon "the General Maritime Law [and] the Ohio Wrongful Death Act, Ohio Revised Code, Sec. 2125.01 et seq." is clearly stated in the very first paragraph. (R. 1.) Moreover, paragraph V of her amended complaint makes her legal position abundantly clear:

> "The failure of the defendant to provide gear and equipment to permit safe access to its vessel from a slippery, dangerous and unsafe dock and the defendant's failure to equip the ship with devices to eliminate the necessity of boarding the vessel by the ladder and tackle arrangement used, rendered the vessel unseaworthy; such unseaworthiness proximately caused the fall of the plaintiff's decedent from the dock and his resultant death by drowning."

Further, allegations of negligence (h), (j), (k), (l), (n), (q) and (r) in paragraph IV (R. 2-4) are clearly allega-

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[4] Court of Appeals opinion (R. 48). And see Memorandum on Motion to Strike by Jones, J. in the federal district court (R. 15).

tions of negligent failure to provide the vessel with gear and equipment, without which the vessel would be unseaworthy.

Petitioner has pleaded respondent's failure to provide adequate equipment and appliances appurtenant to the vessel to permit reasonably safe access to the ship from shore. These allegations fall squarely within the expanded concept of unseaworthiness provided by this Court's recent decisions. Whether a condition of unseaworthiness of a vessel is brought about by operating negligence, *Mahnich v. Southern S. S. Co.*, 321 U. S. 96 (1944) or no negligence at all, *Seas Shipping Co. v. Sieracki*, 328 U. S. 85 (1946), recovery on that ground is not precluded. Further, where the unseaworthiness of the vessel causes injury to an individual on the dock, rather than aboard ship, he may recover on that ground from the vessel owner. *Gutierrez v. Waterman S. S. Corp.*, 373 U. S. 206 (1963).[41]

Moreover, failure to provide an adequate ladder as a safe means of ingress and egress to the vessel has been held to constitute unseaworthiness. *Buch v. United States*, 122 F. Supp. 25 (S. D. N. Y. 1954) *modified and aff'd* 220 F. 2d 165 (2nd Cir. 1955).

Furthermore, not only *may* a seaman or his representatives join in the same action separate counts of Jones Act negligence and unseaworthiness and proceed to trial without electing between them. *McAllister v. Magnolia Petroleum Co.*, 357 U. S. 221 (1958), but if he is to preserve his right to litigate on both grounds, he *must* do so, *Baltimore S. S. Co. v. Phillips*, 274 U. S. 316 (1927).

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[41] And see Frankfurter, J., concurring in *Pope & Talbot v. Hawn*, 346 U. S. 406, 418 (1954): "* * * it will be rare that the circumstances of an injury will constitute negligence but not unseaworthiness."

In view of these holdings, the reasoning of the Court of Appeals becomes, to say the least, obscure, with respect to the following language:

> "It is to be noted that all of the allegations of the complaint constitute assertions of negligence * * * Whether the negligence was failure to provide safe access to the ship for plaintiff's decedent, or *whether the negligence was a breach of defendant's duty to provide a seaworthy ship*, the action is based upon negligence and proximate cause, and on the proof thereof, plaintiff would be entitled to a judgment." (R. 48.) (Emphasis supplied.)

Quite apart from the important differences in beneficiaries dependent upon whether petitioner's claim is grounded upon negligence or unseaworthiness, it would be a harsh application of the rule indeed to hold, as the language of the Court of Appeals would suggest, that petitioner, who would have been barred from pursuing her Jones Act remedy had she *omitted* it from her complaint, is now barred from pursuing her unseaworthiness remedy because she *failed to omit* her Jones Act allegations.

The issue has been properly preserved for review by this Court.

To the plea of the Court of Appeals below that "if *Lindgren v. United States* * * * is to be overruled, the landmarks must be plainer to see," this Court ought to respond by providing the clearly visible landmark which that court seeks: a clear rejection of *Lindgren*, and an explicit statement that, in an action against his employer for the wrongful death of a seaman in state waters, the wrongful death statute of the state may be used to provide an effective remedy for the violation of the federal maritime

duty to keep vessels seaworthy,[42] notwithstanding any other remedies for negligence under the Jones Act which may be available to his beneficiaries.

Such a result is clearly in the public interest, for so long as seamen are employed extensively in the hazardous industry of transportation by ship, so long as maritime torts occur which cause fatal injuries, so many persons will this Court's ruling affect and so far will the shadow of this Court's ruling extend.

II.

THE CLASSES OF BENEFICIARIES NAMED IN THE JONES ACT ARE CUMULATIVE, NOT EXCLUSIVE.

The second question raised is whether the classes of beneficiaries named in the Jones Act are mutually exclusive so that, in a wrongful death action, the existence of a beneficiary in one such class precludes recovery by persons in the other class.

It is true, of course, that if petitioner is successful in her contention under [I], *supra*, that the right to claim under general maritime law and the Ohio Wrongful Death Act is available to her, as a practical matter, this question would become less important, because all of the beneficiaries for whom petitioner originally sued would be

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[42] In overruling *Lindgren*, the determination of how much of the local wrongful death statute and the extent to which the law of the state in whose waters the death occurred controls need not be here considered because of the clear manner in which the issue has been raised by the pleadings. Unless the Court would prefer to explain or reconcile the decisions on this subject in *Southern Pacific R. R. v. Jensen*, 244 U. S. 205 (1917); *The Tungus v. Skovgaard*, 358 U. S. 588 (1959); *United Pilots Ass'n. v. Halecki*, 358 U. S. 613 (1959); *Hess v. United States*, 361 U. S. 314 (1960); *Goett v. Union Carbide Corp.*, 361 U. S. 340, 347 (1960) (Whittaker, J., dissenting) and *Kossick v. United Fruit Co.*, 365 U. S. 731 (1961), in order to provide guidance in the trial of this cause, this task will be left for another day.

restored to the suit by reason of this Court's reversal of the order of the court below. Clearly, if the Ohio Wrongful Death Act (R. C. § 2125.01, et seq.), in conjunction with the doctrine of unseaworthiness, is applicable to the instant action, dependent sisters and brothers as well as a dependent mother may participate as beneficiaries in the same wrongful death action. Section 2125.02, Ohio Revised Code, provides that a wrongful death action "shall be for the exclusive benefit of the surviving spouse, the children and *other next of kin* of the decedent". (emphasis supplied), and this language has been interpreted broadly to include brothers and sisters as well as parents, when both classes of kin are in existence, among the beneficiaries of a single wrongful death action. *Karr v. Sixt*, 146 Ohio St. 527 (1946).

It has been demonstrated that where each of several theories of liability permits recovery for a different class of beneficiaries, recovery by one class upon one theory does not bar the other class from an independent recovery on the other. For example, in *The Four Sisters*, 75 F. Supp. 399 (D. Mass. 1947), the decedent-seaman was unmarried, had no children and was survived by a father, a brother and a sister. The father-administrator brought suit under the Jones Act for the benefit of decedent's dependent sister and himself. After the suit as to the sister was dismissed by the trial court on the ground that the survival of the father precluded Jones Act recovery for the sister because of the mutually exclusive classes of beneficiaries provided by the FELA, the father recovered a Jones Act verdict. After this judgment was satisfied, he brought suit, as administrator, in admiralty for the sister under the Death on the High Seas Act. Held: the sister's action was *not* barred by the prior Jones Act recovery of the father. This decision indicates that where, as here,

different theories of liability establish the right of different classes of beneficiaries to recover, recovery may be had by one class on one theory and by the other class on another.

Any procedural impediment to joining both classes of beneficiaries and both theories of liability in a single action has been removed by *McAllister v. Magnolia Petroleum Co.*, 357 U. S. 221 (1958), decided since *The Four Sisters, supra*, which permits the joinder of several theories in one action, with no requirement that the plaintiff elect between them. See *Whitaker v. Blidberg-Rothchild Co.*, 195 F. Supp. 420, *aff'd* 296 F. 2d 554 (4th Cir. 1961), which permitted a dependent mother to recover for her decedent's death under the Death on the High Seas Act, although in the same action she was denied recovery under the Jones Act because of the survival of a non-dependent daughter of the decedent.

It follows that in the case at bar proof of the petitioner's allegations will permit recovery under the Jones Act by the petitioner as the decedent's mother, and under the doctrine of unseaworthiness to the other named beneficiaries, the decedent's siblings.

But even if this Court should rule against petitioner's claim in [I], *supra*, petitioner contends that under the Jones Act alone, all of the dependent sisters and brother, as well as the mother of the decedent are entitled to participate in the fund created by recovery for their decedent's wrongful death. It is expressly provided by the F. E. L. A.,[45] incorporated by reference into the Jones Act, that in a wrongful death action under the Act, the decedent's personal representative may recover "for the benefit of the surviving widow or husband and children of such

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[45] Federal Employers' Liability Act, 45 U. S. C. § 51 et seq.

employee; *and*, if none, then of such employee's parents; *and*, if none, then of the next of kin dependent upon such employee * * *" (pp. 42-43, *infra*). (Emphasis supplied.)

It is true that in *C. B. & Q. R. Co. v. Wells-Dickey Trust Co., Admr.*, 275 U. S. 161 (1927) this Court interpreted this language narrowly as providing exclusive classes of beneficiaries. But in *Poff v. Pennsylvania R. Co.*, 327 U. S. 399 (1946), this language was interpreted broadly to provide, rather than to defeat, recovery for beneficiaries. The liberal purposes of the Act require such broad interpretation of this as well as other language in the Jones Act and F. E. L. A.

Although the court in *Wells-Dickey*, without analysis, found the express language of the F. E. L. A. to clearly demonstrate the Congressional intent to provide exclusive compartments of beneficiaries, the holding is not merely a *pro forma* reading of the statute; the result that it reached required judicial interpretation of a greater degree as well—judicial interpretation which might well have reached a contrary result, in view of the liberal construction required of the F. E. L. A. The use of the connective "and" between the classes of beneficiaries rather than "or" suggests strongly that Congress intended the classes to be cumulative rather than exclusive. The words "if none" have meaning under this construction of the statutory language by inserting an elliptical "even" before those words, demonstrating that all subsequently named classes participate as beneficiaries, "even if none" exist in the prior class. As to the question of how a recovery shall be apportioned among such beneficiaries, the probate machinery of each state (which adequately confers status to sue upon a personal representative under the same federal acts) provides an equitable and adequate solution.

This statutory construction is at least as valid as that which the Court in *Wells-Dickey* applied, and has the additional advantage of conforming to the spirit of the F. E. L. A. and Jones Act and the liberal construction to which these Acts are entitled.

This Court is urged to re-examine *Wells-Dickey* in this light to give effect to the purposes of this social legislation.

III.

A CLAIM FOR CONSCIOUS PAIN AND SUFFERING SURVIVES DESPITE THE CLOSE PROXIMITY OF THE INJURY AND DEATH.

The third question raised is whether a claim for conscious pain and suffering survives the death of a seaman, where the period of pain and suffering for which compensation is claimed is short and immediately preceded his death by drowning.

It must be noted that, in addition to her claim for the decedent's wrongful death (Paragraph VII, amended complaint, R. 5) petitioner also seeks recovery for *conscious pain and suffering of the decedent while he was alive.* (Paragraph VI, amended complaint, R. 5.)

Even if Respondent's contention that unseaworthiness is not an available theory of liability in actions for *wrongful death* were correct (which petitioner denies, see argument [I] above, pp. 7-34) the language in her complaint which refers to the general maritime law, the doctrine of unseaworthiness and the Ohio Survival Statute, Ohio Revised Code, Sec. 2305.21 et seq., should be retained because she has, in the same action, sought relief, in addition, for *conscious pain and suffering.*

Holland v. Steag, 143 F. Supp. 203 (D. Mass. 1956), so holds. In that case the court held that a state survival

statute "appears effective * * * to bring about a survival of the seaman's right under maritime law to recover for personal injuries caused by the unseaworthiness of the vessel." 143 F. Supp. 203, 206.

And this Court has cited *Holland* with approval in *Kernan v. American Dredging Co.*, 355 U. S. 426, 430, footnote 4 (1958). See also *Just v. Chambers*, 312 U. S. 383 (1941), in which it was held that a state survival statute would permit the survival of a maritime action for personal injuries after the death of the tortfeasor, even though, under the maritime law alone, there would have been no such survival.

But the court below concluded that "there would be no substantial basis, in this case, for a separate estimate of pain and suffering," even "[a]ssuming * * * that a right of action were to pass to decedent's relatives, under the Ohio Wrongful Death Act," [44] based upon the language in *The Corsair*, 145 U. S. 335, 348 (1892), that where suffering is brief and "substantially contemporaneous" with death, the decedent's "fright for a few minutes is too unsubstantial a basis for a separate estimation of damage." [45] The language of the amended complaint which the court below dismissed in such summary manner referred to "severe personal injuries which caused [decedent] excruciating pain and mental anguish prior to his death" [46] and sought compensation therefor.

Since the decision of *The Corsair*, 145 U. S. 335 (1892), many courts have sustained separate awards for conscious pain and suffering where the interval between injury and death was extremely short. E.g., *St. Louis, I. M. & S. R. Co. v. Stamps*, 84 Ark. 241, 104 S. W. 1114

[44] Court of Appeals Opinion (R. 35).

[45] Court of Appeals Opinion (R. 36).

[46] R. 5.

(1907) (verdict of damages for pain and suffering sustained where decedent fell from bridge and drowned); *Boutlier v. City of Malden*, 226 Mass. 479, 116 N. E. 251 (1917) (decedent exclaimed and rolled on ground before death after electrocution; held: conscious pain action sustained); *Campbell v. Romanos*, 191 N. E. 2d 764, 768 (Mass. 1963) (decedent died of burns while running from fire; held: conscious pain and suffering action justified); *Brown v. Oestman*, 362 Mich. 614, 107 N. W. 2d 837 (1961) (proof of flow of blood after decedent was struck on head held sufficient to sustain action for conscious pain and suffering); *Sharpe v. Munoz*, 256 S. W. 2d 890, 892-93 (Tex. Civ. App. 1953) (child died of burns in seconds; although remittitur of part of conscious pain and suffering award was ordered, principle of recovery for conscious pain and suffering where death was almost instantaneous approved). See also *Chicago R. I. & P. R. Co. v. White*, 112 Ark. 607, 165 S. W. 627 (1914); *Davis v. Bolstad*, 295 S. W. 2d 941, 955 (Tex. Civ. App. 1956); *Keowen v. Amite Sand & Gravel Co.*, 4 So. 2d 79 (La. App. 1941).

In the light of this judicial experience, this Court is urged to reconsider the harsh view announced in *The Corsair*.

If, at trial, petitioner is unable to sustain her burden of proof on this issue, her claim for compensation for this portion of her suit should fail for that reason. But she should have the opportunity to make such proof of this contention as she can muster without a prejudgment at the pleading stage that her proof must fail. If the language in *The Corsair* is no longer the position of this Court in view of the developments over the past half-century of tort law with reference to compensability of claims for pain accompanied by mental anguish since that decision, this case provides an opportunity to say so.

The imperatives of orderly and symmetrical treatment of maritime claims arising out of the same incident [47] require that this Court emancipate itself and the inferior federal courts from the hoary rule of *The Corsair*.

CONCLUSION.

For the foregoing reasons, the judgment of the court below should be reversed.

Respectfully submitted,

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BERNARD A. BERKMAN,
Counsel for Petitioner.

BERNARD A. BERKMAN,
Of Counsel.

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[47] E.g., *Fitzgerald v. United States Lines Co.*, 374 U. S. 16 (1963).

APPENDIX A.

MERCHANT MARINE ACT OF 1920, SEC. 33.

46 U. S. C. § 688. *Recovery for Injury to or Death of a Seaman.*

Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common law right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such action shall be under the court of the district in which the defendant employer resides or in which his principal office is located.

FEDERAL EMPLOYERS' LIABILITY ACT.

45 U. S. C. § 51. *Liability of Common Carriers by Railroad, in Interstate or Foreign Commerce, for Injuries to Employees from Negligence; Definition of Employees.*

Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her

personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter.

OHIO WRONGFUL DEATH ACT.

Ohio Revised Code. § 2125.01. *Action for Wrongful Death.*

When the death of a person is caused by wrongful act, neglect, or default which would have entitled the party injured to maintain an action and recover damages if death had not ensued, the corporation which or the person who would have been liable if death had not ensued, or the administrator or executor of the estate of such person, as such administrator or executor, shall be liable to an action for damages, notwithstanding the death of the person injured and although the death was caused under circumstances which make it murder in the first or second degree, or manslaughter. When the action is against such administrator or executor the damages recovered shall be a valid claim against the estate of such deceased person.

When death is caused by a wrongful act, neglect, or default in another state, territory, or foreign country, for which a right to maintain an action and recover damages is given by a statute of such other state, territory, or foreign country, such right of action may be enforced in this state. Every such action shall be commenced within the time prescribed for the commencement of such actions by the statute of such other state, territory, or foreign country.

The same remedy shall apply to any such cause of action now existing and to any such action commenced before January 1, 1932, or attempted to be commenced in proper time and now appearing on the files of any court within this state, and no prior law of this state shall prevent the maintenance thereof.

Ohio Revised Code. § 2125.02. *Proceedings.*

An action for wrongful death must be brought in the name of the personal representative of the deceased person, but shall be for the exclusive benefit of the surviving spouse, the children, and other next of kin of the decedent. The jury may give such damages as it thinks proportioned to the pecuniary injury resulting from such death to the persons, respectively, for whose benefit the action was brought. Except as otherwise provided by law, every such action must be commenced within two years after the death of such deceased person. Such personal representative, if he was appointed in this state, with the consent of the court making such appointment may, at any time before or after the commencement of the suit, settle with the defendant the amount to be paid.

OHIO SURVIVAL STATUTE.

Ohio Revised Code. § 2305.21. *Survival of Actions.*

In addition to the causes of action which survive at common law, causes of action for mesne profits, or injuries to the person or property, or for deceit or fraud, also shall survive; and such actions may be brought notwithstanding the death of the person entitled or liable thereto.

In the Supreme Court of the United States

OCTOBER TERM, 1964.

No. 10.

MABEL GILLESPIE,
Administratrix of the Estate of Daniel E. Gillespie, Deceased,
Petitioner,

v.

UNITED STATES STEEL CORPORATION,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

RESPONDENT'S BRIEF.

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

RESPONDENT'S BRIEF.

Petitioner, in this seaman's case, asks the Court to reverse a number of its admiralty decisions.

Unless the Court shall do so, Petitioner concedes, the decision below should be affirmed.

QUESTIONS PRESENTED.

Petitioner's abstract statement of questions is essentially correct, but, in the context of this record, unrevealing. In the light of the record, the questions presented may be stated as follows:

I. Whether the Court should overrule *Lindgren v. United States* (1930), 281 U. S. 38, and hold that recovery for the death of a seaman may be had, not only as Congress provided in the Jones Act, but also under the Wrongful Death Act of a state.

II. Whether the Court should also overrule *Chicago, Burlington & Quincy Railroad Company v. Wells-Dickey Trust Company* (1927), 275 U. S. 161, and hold that under the Federal Employers Liability Act (which the Jones Act says "shall apply" to seamen's cases) recovery may be had for the benefit of all of the statute-named beneficiaries collectively, rather than seriatim, even though the statute expressly says the recovery shall be for the benefit:

> "of the surviving widow or husband and children of such employee; *and, if none,* then of such employee's parents; *and, if none,* then of the next of kin dependent upon such employee * * *." [1]

III. Whether the Court also should overrule *The Corsair* (1892), 145 U. S. 335, and hold that (apart from damages under the Jones Act for death) recovery may be had for "pain and suffering prior to death" even though no appreciable time elapsed between the accident and death.

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[1] Emphasis supplied throughout the brief.

STATEMENT OF TH CASE.

This case comes here on the pleadings. There has been no trial.

The case awaits trial in the Northern District of Ohio on Petitioner's allegations under the Jones Act. The portion of the case that comes here turns on Petitioner's claims to new relief, not heretofore allowed by admiralty law and admittedly denied by this Court's decisions, reversal of which Petitioner seeks.

—The Accident.

Daniel Gillespie was a seaman on a Great Lakes freighter.

He was returning from shore leave while his vessel lay moored at the dock in the Black River in Lorain, Ohio. The amended complaint says that as he (R. 2):

> "reached for the ladder to board the vessel, his feet slipped on the wet ore and wet surface of the dock, he lost his balance, fell into the Black River at the National Tube Dock and drowned."

Gillespie, aged 38, was not married. He was survived by his mother, who was appointed administratrix, by a brother, and by three sisters, two married and one single. (R. 1.)

—The Claims Asserted.

In addition to the claims for relief under the Jones Act, the Petitioner in the amended complaint averred (R. 1, 5):

(a) A claim to recover under the Ohio Wrongful Death Act which, if *Lindgren* (1930), 281 U. S. 38, stands, is not available to Petitioner.

(b) A claim to recover not only for the benefit of the mother, who (because the decedent left neither spouse nor children) is the sole beneficiary named in the statute, but also for the benefit collectively of the brother and sisters who, if *Wells-Dickey* (1927), 275 U. S. 161, stands, are barred as beneficiaries.

(c) A claim for pain and suffering prior to death, which (since it is not claimed that any appreciable time intervened between the fall and the death) if *The Corsair* (1892), 145 U. S. 335, stands, states no justiciable claim.

—How the Case Comes Here.

When the District Court, Judge Paul Jones, in the Northern District of Ohio, on motion, struck the foregoing claims from the amended complaint, leaving only the Jones Act claims standing (R. 15, 16), Petitioner, without complying with 28 U. S. C. § 1292, relating to interlocutory orders, appealed to the Court of Appeals for the Sixth Circuit. (R. 16.)

In response to motion to dismiss the appeal for want of a final appealable order (R. 17), Petitioner filed in the Court of Appeals an original action for a writ of mandamus to compel Judge Jones to overrule the motion to strike from the amended complaint. (R. 19.)

The Court of Appeals, instead of dismissing, decided the case on the merits, and in an opinion by Judge McAllister, joined by Judges Weick and O'Sullivan, (R. 29) affirmed the rulings of Judge Jones. 321 F. 2d 518. This Court granted certiorari. 375 U. S. 962.

SUMMARY OF ARGUMENT.

I. *Petitioner admittedly cannot prevail except upon wholesale overruling of this Court's cases.* Petitioner:

(a) Calls for reversal of three cases Petitioner considers incorrectly decided.

(b) Says that, once the law is revised to conform to Petitioner's views, the Court will have to "explain or reconcile" six more of its decisions.

(c) Proposes to upset the law, which has been settled for 34 years, that the Jones Act bars a seaman's resort to state remedies.

To accept Petitioner's proposals would be to re-write the admiralty law and, at the same time, to produce a tidal wave that would engulf this Court's work of half a century in establishing that the Federal Employers Liability Act bars resort to state remedies.

The Court should reject the invitation to re-do the past. Here, if ever, is the time to apply *stare decisis*.

II. *The Lindgren rule that the Jones Act excludes state remedies in seamen's cases should be adhered to.* Petitioner's argument to the contrary should be rejected because:

First. Petitioner's attack upon the rule rests on spurious grounds. The Jones Act provides the remedy for death in seamen's cases; to import into the Act remedies under state statutes would not only reject law of long standing but ignore history as well. Since, as is clear, the Jones Act excludes state remedies while the seaman lives, it, by equal reasoning, bars state remedies after death.

Second. If the issue were open, it should today be decided as it was in *Lindgren*. Congress said it intended the

Federal Employers Liability Act to "supplant" state laws. When, 12 years later in the Jones Act, Congress said the Federal Employers Liability Act "shall apply" to seamen's cases, it knew that this Court had held the statute excludes state-provided remedies. As a matter of history, therefore, Congress must have intended to exclude state remedies, which is what *Lindgren* held.

Third. Even if *Lindgren* were, as Petitioner claims, "incorrectly decided," the Court should adhere to the rule of that case. Congress has been content with it for 34 years. If there be need for change, Congress can attend to it, and there is no need to call on this Court to legislate. Especially is this so since revision now of this Court's construction of the Jones Act would generate critical problems in the wider area touched by the Federal Employers Liability Act.

III. *Since the mother survived, more remote kin are barred as beneficiaries*—the *Wells-Dickey* rule should be adhered to. This is the plain meaning of the statute; it has been so construed by this Court in at least three cases. Unless those cases are now to be overruled, an affirmance of the courts below should follow.

IV. *When death follows immediately, claim for pain and suffering does not arise*—the *Corsair* rule should be adhered to. The decedent fell from the dock and drowned. It is not claimed that any appreciable period intervened between the accident and death. Under such circumstances this Court has at least three times held that no claim for pain and suffering arises. Unless those cases too are to be overruled, the courts below should be affirmed.

ARGUMENT.

The cases Petitioner would reverse were correctly decided; but, were it otherwise, the Court at this late date should reject the invitation to re-write the law.

I. PETITIONER ADMITTEDLY CANNOT PREVAIL EXCEPT UPON WHOLESALE OVERHAULING OF THIS COURT'S CASES.

It will be well, before appraising Petitioner's argument, to note the extent to which, if Petitioner is to prevail, the Court is called upon to overrule the past.

1. Court Is Importuned to Re-Style Admiralty Law.

This Court's work of many years in delineating seamen's rights in event of injury or death, is assailed—

—(a) Petitioner Asks That Decisions in Three Areas Be Overruled.

Three decisions of this Court, if they stand, are fatal to Petitioner's appeal. Their rejection, in this case, would have consequences far beyond the area of admiralty jurisdiction, as will be seen. To begin with, note that—

Lindgren (1930), 281 U. S. 38, Petitioner says (p. 6) "was incorrectly decided." In *Lindgren* this Court considered (p. 44) "It is plain" that the Jones Act covering injuries and death of seamen (p. 44):

> "necessarily supersedes the application of the death statutes of the several States."

Petitioner's claim under the Ohio Wrongful Death Act thus admittedly fails unless *Lindgren* is overruled.

Wells-Dickey (1927), 275 U. S. 161, Petitioner says (p. 6) "should be overruled." In *Wells-Dickey* this Court held that under the statute (p. 163):

> "There are * * * three classes of possible beneficiaries. But the liability is in the alternative. It is to one of the three; not to the several classes collectively."

Here, since a beneficiary of one class, the mother, survived, the beneficiaries in the third class (a brother and three sisters) are admittedly excluded unless *Wells-Dickey* is overruled.

The Corsair (1892), 145 U. S. 335, is the third of the decisions the Court (p. 40) "is urged to reconsider." In *The Corsair* (where an interval of "about ten minutes" intervened between the accident and death) the Court held no claim was stated for pain and suffering prior to death because (p. 348):

> "there is no averment from which we can gather that these pains and sufferings were not substantially contemporaneous with her death and inseparable as matter of law from it."

So, here, Petitioner's claim for pain and suffering prior to death fails unless *The Corsair* is overruled.

The overruling of these three decisions (and the cases that have followed them), although essential to the success of Petitioner's appeal, is not the end of the task Petitioner gives the Court.

—(b) Court Is Told It Will in Addition Have to "Explain" Six More Cases.

Petitioner says the overruling of the three cases above named will not be enough. The Court, in reshaping the admiralty law, will still face a task of major proportions. Petitioner says (p. 34, Note 42) the Court will need to:

"explain or reconcile the decisions"

in six more of its cases; five of them less than five years old. The decisions Petitioner says will need explanation or reconciliation are:

Southern Pacific Company v. Jensen (1917), 244 U. S. 205;
The Tungus v. Skovgaard (1959), 358 U. S. 588;
United New York and New Jersey Sandy Hook Pilots Association v. Halecki (1959), 358 U. S. 613;
Hess v. United States (1960), 361 U. S. 314;
Goett v. Union Carbide Corp. (1960), 361 U. S. 340;
Kossick v. United Fruit Co. (1961), 365 U. S. 731.

Concerning the reconciliation and re-examination of these cases, Petitioner says that unless the Court wishes to undertake it now (p. 34):

"this task will be left for another day."

Petitioner's attack on this Court's cases has its storm center in admiralty. However, the Court, in considering whether the invitation to re-write the law should be accepted, should keep in mind that—

2. Petitioner's Construction Would Unsettle Law in Other Areas.

The Jones Act, 46 U. S. C. § 688, which the Court construed in *Lindgren* (1930), 281 U. S. 38, merely says that the Federal Employers Liability Act:

"shall apply"

to seamen's cases. The Jones Act does no more than say that whatever may be the rights given by the Federal Employers Liability Act, they shall apply also to suits for injury to or death of a seaman. Obviously, therefore, whatever the Court may say about the Jones Act will be a construction of the Federal Employers Liability Act. Equally obviously, if the Federal Employers Liability Act (when applied to seamen's cases by force of the Jones Act) gives the seaman remedies under state statutes, the same statute, when applied to railroad workers, must give them like rights under state statutes.

This Court's cases say that the Federal Employers Liability Act *excludes* remedies provided by state statutes. Hence, if a contrary meaning is now—in response to Petitioner's invitation—to be given to the Federal Employers Liability Act when applied to seamen's cases by the Jones Act, what this Court has for more than 50 years asserted is the law, will be undone.

The rule that the Federal Employers Liability Act excludes remedies under state statutes has been law at least since *St. Louis, San Francisco & Texas Railway Company v. Seale* (1913), 229 U. S. 156. There this Court held (p. 158):

> "If the Federal statute [i.e., the Federal Employers Liability Act] was applicable, the state statute [in this case the Texas death statute] was excluded * * *."

The Court, over the years, has adhered to this construction. The Court so ruled in:

North Carolina Railroad Company v. Zachary (1914), 232 U. S. 248, where the Court held the Federal Employers Liability Act barred remedies under the North Carolina act.

St. Louis, Iron Mountain & Southern Railway Company v. Craft (1915), 237 U. S. 648, where the Court held (p. 655) "the state statute is not applicable because superseded, as respects the class of cases to which this one belongs, by the Federal Employers Liability Act."

New York Central Railroad Company v. Winfield (1917), 244 U. S. 147, where the Court held the statute foreclosed resort to remedies under the New York Workmen's Compensation law.

Erie Railroad Company v. Winfield (1917), 244 U. S. 170, where the Court held the statute barred resort to a New Jersey law which, contrary to the Federal Employers Liability Act, provided for compensation without regard to negligence.

New York Central & Hudson River Railroad Company v. Tonsellito (1917), 244 U. S. 360, where the Court held the remedy provided by the statute is exclusive and that no other may be added by the law of a state.

Northern Coal & Dock Company v. Strand (1928), 278 U. S. 142, where the Court considered it settled that Congress has (p. 147) "provided a method under which the widow of Strand might secure damages resulting from his death, and that no state statute can provide any other or different one."

South Buffalo Railway Co. v. Ahern (1953), 344 U. S. 367, where the Court, speaking of this statute, observed that (p. 372) "local law may not gnaw at rights rooted in federal legislation."

Unless the foregoing cases, too, are now to be overruled, it is difficult to see how anyone can say that under the Jones Act there is any room left for remedies under state acts. With all but the last of these decisions before it, the Court in *Lindgren* (1930), 281 U. S. 38, could not well have avoided its holding that the Jones Act (p. 44):

"necessarily supersedes the application of the death statutes of the several States."

Manifestly, overruling of the decisions Petitioner attacks would have consequences not limited to admiralty, but must result in convulsion as well in the wider area touched by the Federal Employers Liability Act.

If ever, here is the time to apply the rule of *stare decisis*.

On this ground alone the Court should reject the invitation to re-do the past. It should, instead, affirm the judgment below.

Apart from *stare decisis*—

II. LINDGREN RULE THAT JONES ACT EXCLUDES STATE REMEDIES SHOULD BE ADHERED TO.

Lindgren (1930), 281 U. S. 38, is in no way out of harmony with this Court's decisions.

Cases where the Court has dealt, in admiralty, with state Wrongful Death Acts and other state-provided remedies, are, of course, here inapplicable. In those cases there was no Federal statute. They were not seamen's cases. The Jones Act, which is here before the Court, and which

deals with seamen's cases, was not there involved. Those cases, here irrelevant, are: *The Tungus v. Skovgaard* (1959), 358 U. S. 588; *United New York and New Jersey Sandy Hook Pilots Association v. Halecki* (1959), 358 U. S. 613; *Hess v. United States* (1960), 361 U. S. 314; *Goett v. Union Carbide Corp.* (1960), 361 U. S. 340. From them Petitioner can draw no nourishment.

Nor does *Lindgren* (1930), 281 U. S. 38, mar the symmetry Petitioner professes to seek in the admiralty law. The logical consistency of the admiralty law, in this area, would indeed be destroyed by the rejection of *Lindgren*. As will be seen—

1. Petitioner's Attack on Lindgren Rests Upon Spurious Grounds.

The beguiling argument urged by Petitioner, that it is illogical to deny after death a remedy for breach of the warranty of seaworthiness the seaman would have had if he had lived, should not obscure the fact that—

—(a) Petitioner Is Not Without Remedy For Death—Jones Act Provides It.

The Jones Act, 46 U. S. C. § 688, provides the remedy in case of the death of a seaman. *Kernan v. American Dredging Co.* (1958), 355 U. S. 426. In this case the Jones Act claim has not been denied. It awaits trial in the District Court. The Jones Act provides in seamen's cases in event of death what land-based law provides ashore through Wrongful Death Acts.

Petitioner, however, pretends to find the Court involved in inconsistencies so monstrous as to call for overruling wholesale the Court's work of half a century. Since a seaman can recover for breach of the warranty of seaworthiness if he lives, Petitioner argues that the seaman's

personal representative, after death, should have the same right under the Wrongful Death Act of the state. The argument is inverted. And most illogical. In truth—

—(b) State Remedies, Denied Living, Are Also Barred After Death.

It is clear that for injuries short of death the seaman must look to the maritime law. He may not look to state-provided remedies.

Petitioner's difficulty is not merely with this Court's cases. Petitioner is in equal trouble in explaining how it can be argued that even though state remedies may not be looked to for redress of the seaman's injuries if he lives, they may be looked to if he dies. *The law that governs in each case is the same; it does not change with death.* In neither case does it embrace state-provided remedies.

Note next that—

2. If Question Were Still Open, It Should Be Decided Same Way.

If *Lindgren* (1930), 281 U. S. 38, had not been decided, and the issue were now to come to the Court as an original question, it should be decided as it was in *Lindgren*.

The reason is that admiralty law is in the Federal domain. No state statute may intrude under any circumstances—except by Federal permission. Here there is neither permission nor room for state-provided remedies because Congress has made the Jones Act remedy the adjunct to traditional admiralty law in seamen's cases. Congress *excluded* state-provided remedies. This is abundantly clear because—

—(a) Congress Said It Intended to Exclude State Remedies.

When Congress enacted the Federal Employers Liability Act, 45 U. S. C. § 51, on April 22, 1908, Congress had before it the report of the House Judiciary Committee (House Report No. 1386, 60th Congress, 1st Session, April 4, 1908) which expressly said the statute (p. 3):

> "will *supplant* the numerous State statutes on the subject * * *."

No one suggested anything to the contrary.

The intent was to "withdraw all injuries to railroad employees in interstate commerce from the operation of varying state laws," this Court pointed out in *New York Central Railroad Company v. Winfield* (1917), 244 U. S. 147. The Federal Employers Liability Act, the Court said (p. 149):

> "was drafted and passed shortly following a message from the President advocating an adequate national law covering all such injuries and leaving to the action of the several States only the injuries occurring in intrastate employment. *Cong. Rec.*, 60th Cong., 1st sess., 1347. And the reports of the congressional committees having the bill in charge disclose, without any uncertainty, that it was intended to be very comprehensive, to withdraw all injuries to railroad employees in interstate commerce from the operation of varying state laws and to apply to them a national law having a uniform operation throughout all the States."

Accordingly, when Congress 12 years later, in 1920, by the Jones Act, 46 U. S. C. § 688, said the earlier statute "shall apply" to seamen's cases, without any hint that it wished to give the statute narrower scope in seamen's cases than it had expressly said the statute would have in

railroad cases, Congress necessarily said it intended to bar state remedies in seamen's cases as it had in railroad cases.

Moreover—

—(b) Congress Knew Statute Had Been Held to Exclude State Remedies.

When Congress in 1920 said the Federal Employers Liability Act "shall apply" to seamen's cases, that statute had already been construed by this Court to exclude state-provided remedies. The Court had so held in *St. Louis, San Francisco & Texas Railway Company v. Seale* (1913), 229 U. S. 156; *North Carolina Railroad Company v. Zachary* (1914), 232 U. S. 248; *St. Louis, Iron Mountain & Southern Railway Company v. Craft* (1915), 237 U. S. 648; *New York Central Railroad Company v. Winfield* (1917), 244 U. S. 147; *Erie Railroad Company v. Winfield* (1917), 244 U. S. 170; *New York Central & Hudson River Railroad Company v. Tonsellito* (1917), 244 U. S. 360.

With this adjudicated construction of the statute before it, Congress, had it intended to give the statute a different scope when applied to seamen's cases, must surely have said so. Congress did not do so. It, therefore, will not do for Petitioner now to argue that Congress intended the limiting construction Petitioner would attribute to the Act.

3. Even If *Lindgren* Were Erroneously Decided, Court Should Retain Rule.

Strong policy considerations suggest that even if *Lindgren* (1930), 281 U. S. 38, were deemed erroneously decided, the Court should nevertheless adhere to the rule of that case.

—(a) Case Has Now Been Law for More Than Third of Century.

Although Petitioner (p. 13) deems *Lindgren* "a hoary blunder," it has met the test of time. The case has survived for 34 years.

To undo it now calls for reasons, not adjectives, because—

—(b) Congress, Were It Dissatisfied, Could Change Law—It Has Not Done So.

Petitioner makes a strong showing (pp. 18-20) of continuing Congressional awareness of, and interest in, seamen's rights. The fact that Congress, alive to these rights, has not chosen to change the Jones Act, justifies the conclusion it is satisfied with the construction put on it by the courts. This alone is assurance that the rule responds to the needs of the times.

The blandishments by which Petitioner would urge the Court to fashion new rules should be rejected here as they were in *The Harrisburg* (1886), 119 U. S. 199, where the Court—in this very area of the law—responded to a like invitation with the comment (p. 214):

> "as it is the duty of courts to declare the law, not to make it, we cannot change this rule."

—(c) Reversal of Lindgren Would Raise Critical Problems in Railway Field.

If the Federal Employers Liability Act, applied to seamen's cases by the Jones Act, has left room for the operation of state remedies, then by like reasoning it has also left room for state remedies in railroad cases. But, as has been seen, the course of decision for more than 50

years has been the other way. State remedies clearly are barred by the Federal Employers Liability Act.[2]

Accordingly, even if there were merit otherwise in the thesis Petitioner espouses, the collateral effect of its adoption upon the vast area reached by the Federal Employers Liability Act alone would counsel rejection of Petitioner's argument.

In summary—on this point—*Lindgren* was correctly decided. But, even if not, uprooting it now would reduce to debris so much of the law of the last 50 years that the Court should reaffirm the rule and leave to Congress the cure of deficiencies—if any there be.

III. SINCE MOTHER SURVIVED, STATUTE BARS OTHER KIN AS BENEFICIARIES—WELLS-DICKEY RULE SHOULD BE ADHERED TO.

The seaman, leaving neither spouse nor children, is survived by his mother. The statute, therefore, operates to bar the brother and three sisters as beneficiaries. This is because the statute, 45 U. S. C. § 51; says the recovery shall be:

> "for the benefit of the surviving widow or husband and children of such employee; *and, if none*, then of such employee's parents; *and, if none*, then of the next of kin dependent upon such employee * * *."

---

[2] *St. Louis, San Francisco & Texas Railway Company v. Seale* (1913), 229 U. S. 156; *North Carolina Railroad Company v. Zachary* (1914), 232 U. S. 248; *St. Louis, Iron Mountain & Southern Railway Company v. Craft* (1915), 237 U. S. 648; *New York Central Railroad Company v. Winfield* (1917), 244 U. S. 147; *Erie Railroad Company v. Winfield* (1917), 244 U. S. 170; *New York Central & Hudson River Railroad Company v. Tonsellito* (1917), 244 U. S. 360; *Northern Coal & Dock Company v. Strand* (1928), 278 U. S. 142; *South Buffalo Railway Co. v. Ahern* (1953), 344 U. S. 367.

The statute thus excludes beneficiaries of a remote class if there be beneficiaries in a nearer class. The liability, as Mr. Justice Brandeis, speaking for the Court in *Chicago, Burlington & Quincy Railroad Company v. Wells-Dickey Trust Company* (1927), 275 U. S. 161, observed (p. 163):

> "is in the alternative. It is to one of the three, not to the several classes collectively."

Petitioner, however, says *Wells-Dickey* (p. 6) "should be overruled" because it was decided (p. 37) "without analysis." It is altogether likely this is the first time anyone has said Mr. Justice Brandeis ever decided anything "without analysis."

The *Wells-Dickey* rule was indeed declared earlier in *St. Louis, San Francisco & Texas Railway Company v. Seale* (1913), 229 U. S. 156, 162, and was adhered to in *Poff v. Pennsylvania Railroad Co.* (1946), 327 U. S. 399, where the Court, refusing (p. 401) "to rewrite the statute," held that (p. 402):

> "when Congress made the widow preferred over the parents and both the widow and parents preferred over the next of kin, it barred the deferred classes from recovering by creating a preferred class which could recover."

Unless these three cases are to be overruled, it is clear that the courts below were right, and should be affirmed, in holding the mother the sole beneficiary.

IV. WHERE DEATH FOLLOWS IMMEDIATELY, CLAIM FOR PAIN AND SUFFERING DOES NOT ARISE—CORSAIR RULE SHOULD BE ADHERED TO.

Here the allegation is that the seaman (R. 3):

> "lost his balance, fell into the Black River at the National Tube Dock and drowned."

No claim is made that any appreciable period intervened between the accident and death. In *The Corsair* (1892), 145 U. S. 335, where death also resulted from drowning (p. 348), "about ten minutes" intervened between the accident and the death. The Court held no claim arose for pain and suffering; the pain and suffering was (p. 348) "substantially contemporaneous with her death and inseparable as a matter of law from it."

The point is that, unless an appreciable period intervenes, there is no basis for the claim. In, for example, *Great Northern Railway Company v. Capital Trust Company* (1916), 242 U. S. 144, an intervening period of ten minutes was held insufficient to establish a claim, whereas in *St. Louis, Iron Mountain & Southern Railway Company v. Craft* (1915), 237 U. S. 648, an intervening period of (p. 654) "more than a half hour" was held enough to create a jury issue. However, the Court added (p. 655):

> "the case is close to the border line, for such pain and suffering as are substantially contemporaneous with death or mere incidents to it, as also the short periods of insensibility which sometimes intervene between fatal injuries and death, afford no basis for separate estimation or award of damages under statutes like that which is controlling here."

Unless, then, these three cases are to be overruled, the courts below were right and should be affirmed.

The further argument Petitioner makes (p. 38) that even if "unseaworthiness is not an available theory of liability in actions for wrongful death" the pain and suffering claim should be deemed saved by the Ohio Survival Statute is equally without merit. The Jones Act excludes *all* state statutes—the Survival Statute equally with the Wrongful Death Act.

The Jones Act claims remain and with the trial of those claims the District Court should be permitted to proceed.

CONCLUSION.

The judgment appealed from should be affirmed.

Respectfully submitted,

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September 4, 1964.

In the Supreme Court of the United States

OCTOBER TERM, 1964.

No. 10.

MABEL GILLESPIE,
Administratrix of the Estate of Daniel E. Gillespie,
Deceased,
Petitioner,

vs.

UNITED STATES STEEL CORPORATION,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

RESPONDENT'S MEMORANDUM CONCERNING REVIEWABLE FINALITY OF JUDGMENT UNDER REVIEW.

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In the Supreme Court of the United States

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

RESPONDENT'S MEMORANDUM CONCERNING REVIEWABLE FINALITY OF JUDGMENT UNDER REVIEW.

This memorandum is filed by Respondent in response to the Court's request that counsel discuss the question whether the record presents a reviewable final judgment.

I. RESPONDENT MOVED TO DISMISS APPEAL BELOW FOR WANT OF FINAL ORDER BUT WAS OVERRULED.

This Jones Act case, brought by the administratrix of a Great Lakes seaman, is here on certiorari to review the decision of Judge Jones in the Northern District of Ohio, affirmed by the Sixth Circuit, in which both courts below (R. 15-16):

1. Struck claims based on the Ohio Wrongful Death Act on the ground the Jones Act and this Court's cases leave no room for the operation of state-provided remedies in seamen's cases, and

2. Struck claims asserted on behalf of a brother and three sisters on the ground the federal statute and this Court's cases bar claims of remote beneficiaries where, as here, a beneficiary of an earlier class (the mother) survives.

3. Struck claims of pain and suffering prior to death on the ground this Court's cases bar such claims where, as here, no appreciable interval separates accident and death.

The matter came to the Court of Appeals on the appeal of the administratrix and on her petition under the "All Writs" Act. (R. 16, 18-23.) The court below consolidated the actions. (R. 25.) Respondent moved to dismiss the appeal for want of a final reviewable order. (R. 17.) The Court of Appeals (Judges McAllister, Weick and O'Sullivan), upon an analysis of the nature of the order (R. 32-34) considered the question (R. 33) "a close one" but concluded a reviewable judgment was presented. The Court of Appeals so ruled on the ground interim orders have been ijudged reviewable under special circumstances of the kind the court deemed here present. (R. 33.)

In resisting certiorari, Respondent urged that a reviewable order was not presented. Now, however—

II. CERTIORARI HAVING BEEN GRANTED, AND ISSUES BRIEFED AND ARGUED, DOUBTS CONCERNING REVIEWABILITY SHOULD BE RESOLVED IN FAVOR OF REVIEW.

Strong policy considerations counsel rejection of interim orders tendered for review. Now, however, the case having been accepted for review here and having been briefed and fully argued, additional considerations come into play. These considerations, it is believed, suggest the wisdom of deciding the case on its merits, especially where the issue of reviewability, as the court below concluded, is close.

1. Policy Considerations Favor Decision of Case on Merits.

Two important considerations weigh in favor of decision now:

1. *The grant of certiorari has put a cloud* on the admiralty rule deemed settled for 34 years and stirs disturbing problems in the wider railway field governed by the same federal statute where a half century of decisions says the statute leaves no room for state-provided remedies. The question is obviously an important one. It should not be left in doubt. If the Court now dismisses the appeal without decision, the law in these areas will be in turmoil until the Court can speak. In the meantime the rights of many will be sacrificed on the turn of counsel's guess and many suits will be filed that otherwise would not be (to protect against a turn in the law). This is not a desirable result.

2. *The doctrine of conservation of judicial energies* counsels decision now. It is, no doubt, this very doctrine that supports the refusal of courts to review interim orders.

Here, however, refusal to decide will make work—not reduce it. For until the issue is settled by this Court, fresh problems and suits will beset courts, lawyers and suitors.

2. Case Law Makes Interim Decisions Reviewable in Special Circumstances.

The rule barring piecemeal review is well settled. Many cases would support dismissal of the appeal for want of a final order:

Lewis v. E. I. du Pont de Nemours & Co., Inc. (5 C. A., 1950), 183 F. 2d 29;

Hohorst v. Hamburg-American Packet Company (1893), 148 U. S. 262;

Stewart v. Shanahan (8 C. A., 1960), 277 F. 2d 233;

Chadbourn Gotham, Inc. v. Vogue Manufacturing Corporation (4 C. A., 1958), 259 F. 2d 909;

Thompson v. United States (4 C. A., 1957), 250 F. 2d 43;

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Libbey-Owens-Ford Glass Co. v. Sylvania Industrial Corporation (2 C. A., 1946), 154 F. 2d 814, certiorari denied (1946), 328 U. S. 859;

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Cox v. Graves, Knight & Graves, Inc. (4 C. A., 1932), 55 F. 2d 217;

Markham v. Kasper (7 C. A., 1945), 152 F. 2d 270;

Harvey Aluminum v. Industrial Longshoremen's and Warehousemen's Union (9 C. A., 1960), 278 F. 2d 63.

However, the rule of finality for purposes of appellate review is by no means easy of application. As Mr. Justice Jackson observed, in *Dickinson v. Petroleum Conversion Corp.* (1950), 338 U. S. 507, the courts have struggled (p. 511):

> "sometimes to devise a formula that will encompass all situations and at other times to take hardship cases out from under the rigidity of previous declarations; sometimes choosing one and sometimes another of the considerations that always compete in the question of appealability, the most important of which are the inconveniences and costs of piecemeal review on the one hand and the danger of denying justice by delay on the other."

Thus, review has been granted in many situations where the order under challenge did not in fact terminate the litigation and was not in any real sense final. Illustration may be found in cases where the Court has reviewed orders involving issues, decision of which was deemed fundamental to the further conduct of the case, as, for example, in:

Land v. Dollar (1947), 330 U. S. 731, where, although the case still awaited trial, this Court held the challenged decision reviewable for the reason thus summarized by Mr. Justice Douglas (p. 734, Note 2): "Although the judgment below was not a final one, we considered it appropriate for review because it involved an issue 'fundamental to the further conduct of the case.' "

United States v. General Motors Corp. (1945), 323 U. S. 373, where this Court reviewed rulings on evidence notwithstanding the case had been remanded for a new trial. The Court observed, in an opinion by Mr. Justice Roberts (p. 377): "We think we should review that ruling inasmuch as

it is fundamental to the further conduct of the case."

The same principle would seem to apply here. Claims and parties have been eliminated under circumstances where, no matter what the result upon a new trial, a fresh appeal will follow unless—as seems unlikely—petitioner will be content to abandon claims petitioner has thus far carried all the way to this Court.

The question of finality for purposes of review arises in every case where the cause has been remanded for a new trial. However, in such cases where the question involved has been deemed sufficiently "important" the Court has ruled the order reviewable. *Larson v. Domestic and Foreign Commerce Corp.* (1949), 337 U. S. 682, 685, Note 3; *Forsyth v. Hammond* (1897), 166 U. S. 506, 513.

Similarly, the Court under special circumstances has held reviewable the denial of leave to proceed in forma pauperis, *Roberts v. United States District Court for the Northern District of California* (1950), 339 U. S. 844, and ruling on a temporary injunction, *Hanover Star Milling Company v. Metcalf* (1916), 240 U. S. 403, 409 "notwithstanding the general rule to the contrary."

The Court also has deemed reviewable orders otherwise not strictly final where they turned on a severable claim. *Cohen v. Beneficial Industrial Loan Corp.* (1949), 337 U. S. 541, 546; *Swift & Company Packers v. Compania Colombiana del Caribe, S. A.* (1950), 339 U. S. 684, 689; *Stack v. Boyle* (1951), 342 U. S. 1, 6.

Albeit the Court's power to take such cases is not lightly to be exercised, once the case is here, and fully briefed and argued, strong policy considerations, as in this case, may well favor decision of the questions raised.

CONCLUSION.

For the reasons stated, the Court can and, it is believed, should decide the case on the merits.

Respectfully submitted,

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